

# STUDY PAPER

on

## PROSPECTS FOR CIVIL JUSTICE


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ONTARIO LAW REFORM COMMISSION

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## PROSPECTS FOR CIVIL JUSTICE

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ONTARIO LAW REFORM COMMISSION

Government  
Publications

A Study Paper by Roderick A. Macdonald

with commentaries by:

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William A. Bogart

Owen Fiss

Marc Galanter

Bryant Garth

Cyril Glasser

Deborah R. Hensler

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Peter H. Russell

Susan S. Silbey

Lynn Smith

Michael J. Trebilcock

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Attorney General for Ontario

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We have the honour to submit our *Study Paper on Prospects for Civil Justice*.

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March, 1995



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## PREFACE

This *Study Paper on Prospects for Civil Justice* by Professor Roderick A. Macdonald, of the Faculty of Law, McGill University, together with related commentaries by a distinguished group of experts, is published by the Ontario Law Reform Commission as a contribution to the work of the Ontario Civil Justice Review.

The Ontario Civil Justice Review is a joint initiative of the Government of Ontario and the Ontario Court of Justice (General Division). The review is co-chaired by the Honourable Robert Blair, a Justice of the Ontario Court (General Division) and Ms. Sandra Lang, the Assistant Deputy Attorney-General, Courts Administration. The terms of reference for the review, which are set out as Appendix I to Professor Macdonald's paper, mandate the review to develop an overall strategy for making the civil justice system speedier, less complex and less costly for litigants, and for maximizing the effectiveness of public spending on civil justice. The review is conducting this mandate through two separate working groups, an Interim Task Group, and a Fundamental Issues Group.

The Interim Task Group has been asked to look at improvements to the system of civil justice from the inside—essentially issues of administration and procedure within the judicial system. It will identify immediate points of pressure on the courts and offer proposals to relieve this pressure. It is charged, among other things, with examining the potential contributions that case-flow management, management information systems and scheduling, increased judicial support, the better use of technology, and simplified Rules of Practice for small debt and like cases might make to achieving greater efficiencies.

The Fundamental Issues Group, by contrast, is to reflect upon the optimal structure for organizing the system of civil disputing in Ontario. Which disputes ought to be decided by adjudicative processes before courts? Which disputes could or ought to be decided by other public bodies such as administrative agencies, or by other decisional processes such as mediation? Which disputes could or ought to be decided by private decisionmakers, whether through adjudication or some other dispute resolution process? The Fundamental Issues Group is also to assess the contribution that judges, court officials, private industry, litigants and the bar can make to improving the civil justice system.

The Fundamental Issues Group is co-chaired by J. Douglas Ewart, Director of the Policy Development Division of the Ontario Ministry of the Attorney General and John D. McCamus, Chair of the Ontario Law Reform Commission. Although the Civil Justice Review is not, in any sense, a project of the Ontario Law Reform Commission, it was nonetheless anticipated that the Commission might contribute in some fashion to the work of the review by undertaking special projects, from time to time.

At an early stage in the work of the Fundamental Issues Group, the co-chairs determined that it would be useful to commission a paper that would identify and analyze the critical policy issues entailed in a fundamental reconsideration of civil disputing in Ontario. The intention was to generate a document that would stimulate reflection and focus attention on modifications to the system of civil justice that might be implemented within the near future. As well, it was hoped that such a paper could bring to a wider audience the insights that can be drawn from the rich body of academic research related to civil disputing that has been undertaken in recent decades by legal scholars and by academic researchers in related disciplines.

We were very fortunate in attracting Professor Macdonald to an assignment of this kind. Professor Macdonald brought to the task of preparing this study paper an intimate familiarity with the literature in this field and the insights he has developed through his own research in this area, including his recent work as the chair of a *Task Force on Access to Civil Justice* for the Province of Quebec. Early drafts of Professor Macdonald's Study Paper were circulated within the Civil Justice Review and proved to be very helpful in the early stages of the work of the review.

In an attempt to build upon the insights developed in the Macdonald paper, we determined that it would be helpful to gather together a group of academic experts who could review and reflect upon the Macdonald paper and offer the Fundamental Issues Group some advice with respect to the lines of inquiry and types of research the Group could most usefully pursue. Professor Michael Trebilcock, of the Faculty of Law of the University of Toronto, kindly agreed to assist in the organization of a symposium of this kind. A most distinguished panel of Canadian, American and English experts was assembled. The resulting symposium was convened at the premises of the Ontario Law Reform Commission on November 19th, 1994. Each of the participants was invited to prepare a brief written reaction to the Macdonald paper. The present volume contains slightly revised versions of the Macdonald paper and of the commentaries prepared by participants in the symposium.

While the present volume thus represents the result of an initial round of consulting with academic experts in the field of civil disputes, it should perhaps be noted that this is merely one of several rounds of consultations being undertaken by the members of the Fundamental Issues Group. A series of meetings were convened by the group with a variety of interested groups including those representing racial minorities, the disabled, women, francophones, aboriginal people, the Alternate Dispute Resolution community, and business and consumer groups. The information and insights gathered from these various consultations will be of assistance in informing the deliberations of the Fundamental Issues Group.

On behalf of the Fundamental Issues Group and the Ontario Law Reform Commission, it is appropriate to express here our grateful appreciation to Professor Macdonald for undertaking this burdensome assignment and for producing such a stimulating and thoughtful paper. We are also grateful, of course, to each of the distinguished experts who participated in the symposium and to Professor Trebilcock for his contribution to the organization of this event. Finally, we express our appreciation to Cora Calixterio, Commission secretary, who converted the various manuscripts into their published form.



## LIST OF CONTRIBUTORS

### Harry W. Arthurs

Harry Arthurs is a Professor of Law and Political Science, the former Dean of Osgoode Hall Law School and President Emeritus of York University. He received his B.A. and LL.B. degrees from the University of Toronto and his LL.M. from Harvard. He is a Fellow of the Royal Society of Canada. He has served on many public, professional and academic bodies, and as a mediator and arbitrator in labour disputes. He is the author of reports, books and articles on labour law, administrative law, legal education, the legal profession, legal history and university affairs.

### William A. Bogart

W.A. Bogart is a Professor of Law, University of Windsor. The author of articles dealing with civil procedure, the impact of litigation, and empirical research of legal policy, he is also the co-author of *Civil Litigation* (Toronto: Emond Montgomery, 1991, 4th ed.), the author of *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994), and is at work on a book about the complexities of assessing the impact of law on social and political issues. Currently Director of Research, the Federal Court of Canada, Rules Revision Project (with D. Ferland), W.A. Bogart is also a member of the Board of Directors of the Canadian Law and Society Association and of the Board of Advisors for the University of Windsor's Humanities Research Group.

### Owen M. Fiss

Owen Fiss is Sterling Professor of Law at Yale University. He was educated at Dartmouth (1959), Oxford (1961) and Harvard (1964). He clerked for Thurgood Marshall (when Marshall was a judge of the United States Court of Appeals for the Second Circuit) and later for William J. Brennan, Jr., of the Supreme Court of the United States. Professor Fiss also served in the Civil Rights Division of the Department of Justice and, before moving to Yale, taught at the University of Chicago. At Yale he teaches procedure, legal theory, and constitutional law and is the author of many articles and books on these subjects, including *The Structure of Procedure* (1979), coauthored with Robert Cover, and *Procedure* (1988), coauthored with Robert Cover and Judith Resnik.



## **Marc Galanter**

Marc Galanter is Evjue-Bascom Professor of Law and South Asian Studies at the University of Wisconsin-Madison. He is Director of Wisconsin's Institute for Legal Studies, a leading centre for empirical study of the legal system. He received degrees in philosophy and law from the University of Chicago. In addition to the University of Wisconsin he has taught at Chicago, Buffalo, Columbia and Stanford.

He is the author of a number of seminal studies of litigation and disputing in the United States. These include pioneering studies on the impact of disputant capabilities in adjudication, the relation of public legal institutions to informal regulation, and patterns of litigation in the United States. His most recent book, *Tournament of Lawyers* (with Thomas Palay, 1991), attempts to explain the growth and transformation of large law firms. He has been an outspoken critic of misrepresentations of the American civil justice system and of the inadequate knowledge base that makes the system so vulnerable to misguided attacks. A leading figure in the empirical study of the legal system, he has been editor of the *Law & Society Review*, President of the Law and Society Association, Chair of the International Commission on Folk Law and Legal Pluralism, a member of the Council on the Role of Courts, and a Guggenheim Fellow.

## **Bryant G. Garth**

Bryant Garth is director of the American Bar Foundation. Prior to coming to the ABF in 1990, he was dean of the Indiana University School of Law-Bloomington. His degrees are from Yale, Stanford Law School, and the European University Institute in Florence. His current research interests centre on the internationalization of legal practice and especially transformations in the role of law and the processes of dispute resolution.

## **Cyril Glasser**

Cyril Glasser is the Managing Partner and Head of the Litigation Department of a London firm of solicitors, Sheridans. He received LL.B. and LL.M. degrees from the London School of Economics and was admitted a solicitor in 1967. He is currently Visiting Professor in Law at University College, London and has been teaching an LL.M. course in the Principles of Civil Litigation since 1988. He has written and lectured widely on legal services, the legal profession, civil litigation and modern legal history.

From 1974-77, he was Special Consultant to the Lord Chancellor's Legal Aid Advisory Committee and has been a member of a number of committees dealing with legal aid matters. He is currently a member of the Editorial Board of *The Modern Law Review* and the Editorial Advisory Board of *The Litigator* and is a member of the Board of Management of the Institute of Judicial Administration (University of Birmingham) and the Advisory Board of The Centre of Advanced Litigation (Nottingham Law School).

### **Deborah R. Hensler**

Deborah R. Hensler is Director of the Institute for Civil Justice (ICJ) at RAND and Professor of Law and Social Science at the University of Southern California Law Center. Dr. Hensler was a founding member of the Institute's research staff and served as its Research Director from 1986-1990. Her research on the civil justice system has focused on dispute resolution procedures in ordinary and complex personal injury litigation. She has authored research monographs and journal articles on alternative dispute resolution, mass torts and compensation for personal injury, and appeared before judicial, legislative and executive agencies at the state and federal level to discuss tort liability issues.

Dr. Hensler joined RAND in 1973. She received her Ph.D. in Political Science from the Massachusetts Institute of Technology in 1973, and her A.B., *summa cum laude*, from Hunter College in 1963. Dr. Hensler currently serves on the Board of Directors of the American Arbitration Association; the American Judicature Society; the Ninth Circuit Race, Ethnicity and Religious Bias Task Force; and the Public Policy Committee of the Society for Professionals in Dispute Resolution (SPIDR).

### **Roderick A. Macdonald**

Roderick A. Macdonald is currently F.R. Scott Professor of Constitutional and Public Law at McGill University, Montreal, where he has taught since 1979. He received a B.A. degree from York University, an LL.B. from Osgoode Hall Law School, an LL.L. from the University of Ottawa, and an LL.M. from the University of Toronto.

From 1975-1979 he taught at the University of Windsor, where from 1977-79 he was Director of the Community Law Programme. From 1984-1989 he was Dean of Law at McGill University, and from 1989-1994 was the Director of the Law in Society Programme of the Canadian Institute for Advanced Research. Between 1989 and 1991 he was the Chair of the Task Force on Access

to Justice of the Quebec Ministry of Justice. He was called to the Bar of Ontario in 1977 and to the Quebec Bar in 1983. Professor Macdonald has written numerous governmental reports, articles and notes on topics in constitutional law, administrative law, civil law, commercial law, the philosophy of law, and the sociology of law. Recently, he co-authored *Quebec Civil Law* (1993), a study of the origins, methods and principles of the private law of Quebec.

### **George L. Priest**

Professor Priest is the John M. Olin Professor of Law and Economics at Yale Law School where he teaches Insurance Policy, Regulated Industries, Antitrust, Capitalism, and Torts. He is a graduate of Yale College (1969) and the University of Chicago Law School (1973), and is the author of a wide number of articles and monographs on the effect of changes in civil liability on insurance markets, product manufacture and the accident rate. He is the Director of the Program in Civil Liability at Yale Law School and served as a member of the American Bar Association President's Commission to Improve the Liability Insurance System. He has served as a consultant on a variety of tort reform and insurance regulation issues in the U.S. and Canada.

### **Peter H. Russell**

Peter H. Russell is a University Professor and Professor of Political Science at the University of Toronto where he has taught since 1958. His fields of research and teaching are constitutional and judicial politics. His recent books include *Federalism and the Charter*, *The Judiciary in Canada: The Third Branch of Government* and *Constitutional Odyssey: Can Canadians Become a Sovereign People?*

Professor Russell earned his B.A. at the University of Toronto and an M.A. at Oxford University which he attended as a Rhodes Scholar. He has been awarded honorary LL.D. degrees by the University of Calgary and the Law Society of Upper Canada. He is a past president of the Canadian Political Science Association and the Canadian Law & Society Association. Among the public service positions he has held are Director of Research for the Royal Commission on Certain Activities of the RCMP and founding Chair of Ontario's Judicial Appointments Advisory Committee. He is currently serving as Chair of the Research Advisory Committee of The Royal Commission on Aboriginal Peoples. Professor Russell is an Officer of the Order of Canada and a Fellow of the Royal Society of Canada.



## Susan S. Silbey

Susan S. Silbey is Professor of Sociology at Wellesley College. She received her M.A. and Ph.D. in Political Science from the University of Chicago and completed additional training in Sociology at Brandeis University. Her research has explored citizen interactions with law in a variety of formal legal settings - an Attorney General's Office of Consumer Protection, lower courts, and mediation programs. She is currently engaged in a study of the place and cultural meanings of law in the informal daily life of Americans. Her work has appeared in such journals as *Law and Society Review*, *Law and Social Inquiry*, *Law and Policy*, *Justice System Journal*, *Droit et Societe*, and *Actes de la Recherches en Sciences Sociales*. She is co-editor of *Studies in Law, Politics and Society*, a research annual that brings together work in social sciences, humanities, and law. Recently serving on the Board of the Harvard Program on Negotiation, and the Fund for Research on Dispute Resolution and numerous editorial boards, she will begin a term as President of the Law and Society Association in June 1995.

## C. Lynn Smith

Lynn Smith, Q.C. has been a full-time member of the University of British Columbia, Faculty of Law since 1981 and has served as Dean of the Faculty since July 1, 1991. Lynn Smith received an Honours B.A. in Philosophy from the University of Calgary in 1967, and an LL.B. from the University of British Columbia in 1973. She clerked for the Chief Justice of British Columbia, then practised law (general litigation) in Vancouver with Shrum, Liddle & Heberton (now McCarthy Tetrault) from 1974-1981. She was named Queen's Counsel in 1992. Her areas of teaching include Evidence, Civil Litigation, the Canadian Charter of Rights and Freedoms and Equality Rights. Her areas of research include fields of human rights, Charter equality rights and women's equality, as well as civil litigation. She has published various articles, book chapters and case comments on these and related topics. She is co-author (with the Honourable John Bouck) of *Civil Jury Instructions* (Vancouver: Continuing Legal Education Society, 1989, with yearly updates).

She has acted as an arbitrator of grievances under collective agreements, as a Board of Inquiry in human rights complaints, and has served on various advisory committees to the B.C. government, including the Special Advisors to the Minister of Labour on the Industrial Relations Act and the Advisory Committee to the Commission on the Public Service and the Public Sector. Dean Smith has worked on continuing judicial education programs on various issues, including gender equality.



## Michael J. Trebilcock

Professor of Law, Director of the Law and Economics Programme, and Chairman of the International Business and Trade Law Programme at the University of Toronto Law School. He has authored or co-authored *The Common Law of Restraint of Trade* (1986), *Canadian Competition Policy* (1987), *Trade and Transitions: A Comparative Analysis of Adjustment Policies* (1990), and *The Limits of Freedom of Contract* (Harvard University Press, 1993) and is co-author of a forthcoming treatise, *International Trade Regulation* (Routledge, London). The first book was awarded the Walter Owen Prize in 1988.

He has also been associated with various studies on Canadian competition policy, public enterprise in Canada, business bail-outs in Canada, misleading advertising and unfair business practice laws, regulatory reform and the choice of governing instruments, “reinventing” government, regulation of the professions, trade-related adjustment assistance policies, trade remedy laws, tort reform and the liability insurance crisis, traffic safety regulation, and liability for medical malpractice. He was a member of the Competition Tribunal from 1987-89. He was a Visiting Scholar at the University of Chicago Law School (1976) and Yale Law School (1985). In 1986, he was elected a Fellow of the Royal Society of Canada. In May of 1991 he was named a University Professor at the University of Toronto.

## Garry D. Watson

Professor of Law, Osgoode Hall Law School of York University. His education includes an LL.B. (Melbourne) and an LL.M. (Yale). He is a member of the Ontario Bar. Professor Watson joined Osgoode’s faculty in 1966 and has been visiting professor at universities in both Canada and the United States.

His teaching and research interests are in the area of civil litigation – civil procedure, trial practice and administration of civil justice. He is the co-author of two publications on the Ontario Rules of Civil Procedure – Watson & McGowan, *Ontario Civil Practice* and Holmsted and Watson, *Ontario Civil Procedure*. He is presently preparing a book on Ontario’s new class action legislation. He is a member of the Ontario Civil Rules Committee and of its research arm, the Rules Secretariat. He was in private practice with a Toronto law firm for two years in the mid-80s and from 1991-1994 was Director of Professional Development at the firm of Blake, Cassels & Graydon.



# PROSPECTS FOR CIVIL JUSTICE

Roderick A. Macdonald\*

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## FOREWORD

This Study Paper was initially conceived as a short examination of some of the key policy issues implied by a rethinking of the institutions and processes of civil disputing in Ontario. Part Two directly addresses how various alternatives to the judicial process might be conceived and implemented. It also considers whether a reallocation of certain kinds of dispute will actually make civil justice more economical, expeditious and accessible to litigants.

But much of the current interest in what is called Alternative Dispute Resolution (A.D.R.) flows from reasons that are not centrally related to problems of cost, delay and access to civil justice within the ordinary judicial system. The popularity of A.D.R. in legal circles also results from basic changes over the past thirty years to the way in which law is used to formulate, shape and channel interpersonal and social conflict. Illustrating the nature of these changes and their bearing on the rate and character of civil litigation has contributed to considerable lengthening of this Study Paper. Moreover, the A.D.R. movement has gained momentum because of an increased awareness of the real patterns of civil disputing in modern society, and the publication of detailed empirical studies of the relative incidence of litigation, mediation, negotiation and settlement in managing and resolving conflict. Tracing the implications of these empirical studies for the allocative choices confronting policy makers has also increased the length of the present document.

The overall object of this Study Paper is two-fold. First, to suggest why, despite their general importance, the issues explicitly delegated to the Fundamental Issues Group for investigation are only a part of the solution to improving the efficiency and accessibility of civil justice. Second, to sketch out a more general framework for inquiring into Ontario's civil justice system, and to identify specific research projects that could contribute to the work of the Civil Justice Review.

Despite these new ambitions, this Study Paper retains an organization and approach dictated by its initial purposes. On the one hand, it does attempt to address directly most of the specific questions—such as the utility of greater precision in legislative language or of greater appellate control over the development of the law—that the Fundamental Issues Group was asked to investigate. On the other hand, it does not consider in detail any techniques for enhancing access to justice such as pre-paid legal insurance, contingency fees, legal aid, para-legals, public legal education, and so on, that lie outside the explicit mandate of the Civil Justice Review. Most importantly, this Study Paper is not written primarily for an academic or even a professional audience. This means that it has been organized so as to identify, explore and evaluate everyday

intuitions about law and civil justice. As such, it only presents a framework for analysis, and does not presume to be a work of critical scholarship.

There is an enormous scholarly literature on all the topics canvassed in this Study. Articles and monographs by economists, sociologists, anthropologists, experts in public administration and policy studies, philosophers and political scientists abound. Multiple citations to the legal literature alone could be given for just about every observation or assertion that is made. In order to avoid cluttering up the text, however, discursive footnotes have been kept to a minimum, other than in the Introduction. They are usually limited to signalling the most comprehensive or provocative works, and to providing references for points peripheral to the main argument.

Appendix VI comprises a more complete bibliography of leading scholarly authorities, and lists key sources containing further bibliographies. Three such sources merit mention here. The "Symposium on Dispute Processing" (1989) 66 *Denver University Law Review* 335-561 offers a detailed examination of the main questions about Alternative Dispute Resolution addressed by this Study and a comprehensive bibliography of relevant scholarship. Its sophistication far surpasses that of the present document. In addition, as this Study was being prepared for publication, there appeared a "Symposium on Civil Justice Reform" (1994) 46 *Stanford Law Review* 1285-1634 that examines many aspects of the U.S. Civil Justice Reform Act of 1990. Several papers in that symposium offer the results of empirical studies of judicially-induced settlement, enhanced discovery processes and A.D.R. as strategies for improving the civil justice system. Their footnotes contain substantial bibliographical information. Finally, the Report of the *Groupe de travail sur l'accessibilité à la justice du Ministère de la justice de Québec* entitled *Jalons pour une plus grande accessibilité à la justice*, (Quebec: Ministère de la justice, 1991) covers substantially the same ground as has been assigned to the two Working Groups of the Civil Justice Review.

In preparing this Study Paper I have profited from several discussions with friends and colleagues who critically reviewed earlier drafts. My thanks especially to Harry Arthurs of Osgoode Hall Law School, to Michael Trebilcock of the University of Toronto, to Brayton Polka of York University, to my colleagues Jeremy Webber and Richard Janda, and my doctoral students Seana McGuire and Desmond Manderson at McGill University, and to the Commissioners of the Ontario Law Reform Commission. I am also most grateful to the participants at the Symposium on Civil Justice sponsored by the Ontario Law Reform Commission on November 19, 1994 for their comments on the penultimate draft of this paper. In order that the published versions of these comments retain their cogency I have refrained from substantially altering any observations in this earlier draft that attracted critical attention. Appendix V has,



however, been slightly recast so as to make its heuristic purposes more patent. It should, consequently, be read alongside the various commentaries that suggest, quite correctly in my view, the difficulties inherent in producing any such laundry-list for allocating civil disputes among different public and private institutions.

## INTRODUCTION — THE WHAT AND WHY OF A CIVIL JUSTICE REVIEW

### 1. THE NEED FOR A CIVIL JUSTICE REVIEW

Many observers see the ambivalent attitude that citizens have towards law, lawyers and the legal system as one of the central paradoxes of contemporary Canadian society. Citizens are increasingly turning to law and the courts as a means of obtaining civil justice—solving conflicts with neighbours, family members, and strangers; seeking empowerment in the workplace and the marketplace; invoking the due process and equality guarantees of the *Canadian Charter of Rights and Freedoms* in relation to governmental activity; protecting the environment through public interest litigation; and so on. At the same time, they are feeling increasingly frustrated by what they perceive to be law's failures—the gap between what the letter of the law promises and what it is actually able to deliver; the detail and complexity of even the simplest types of legal regulation; the limited scope and effectiveness of judicial remedies; and the cost and delays associated with the process of civil disputing.

Despite its apparent novelty, this ambivalence about law is not new. Four hundred years ago Shakespeare made much of the paradox of faith and loss of faith in law.<sup>1</sup> At the turn of the century the great U.S. law professor, Roscoe Pound, scandalized the American Bar Association with an address entitled “The Causes of Popular Dissatisfaction With the Administration of Justice”, while proposing, in another paper delivered at about the same time, more law to accommodate and give recognition to what he characterized as then-emerging “social interests”.<sup>2</sup> Indeed, throughout the 20th century the legal professions have grappled with how to make law more nearly live up to its aspirations.<sup>3</sup>

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<sup>1</sup> See, most notably, *Measure For Measure*, apparently composed during the summer of 1604. For a brief discussion of the legal dimensions of the play, see M. C. Bradbrook “Authority, Truth and Justice in *Measure for Measure*” (*Review of English Studies*, 1941).

<sup>2</sup> See R. Pound, “The Causes of Popular Dissatisfaction With the Administration of Justice” (1906) 40 *American Law Review* 729; R. Pound, “The Need of a Sociological Jurisprudence” (1907) 29 *Green Bag* 607. Both these essays have a remarkably contemporary ring and serve as a reminder of the perennity of the problems giving rise to the Civil Justice Review.

<sup>3</sup> The literature on lawyers and the legal professions is enormous. See, generally, R. Abel and P. Lewis, eds., *Lawyers in Society*, 3 vols., (Berkeley: University of California Press, 1987-1989). The third volume of this survey, subtitled *Comparative Theories*, provides a most useful insight into the sociology of the profession and the role of lawyers in generating public ambivalence about law. On the situation in Canada, see D. Stager and H. Arthurs, *Lawyers in Canada* (Toronto: University of Toronto Press, 1990).

Yet there is an appearance of something new about the way the struggle for law is cast today. In recent years, even professional participants in the processes of law-creation and law-application—legislators, public servants, judges, court officials—have come to share the ambivalence of the general public and the legal professions. Many legislators and public servants—even those who are deeply committed to enhancing social and economic equality—no longer view legislative regulation as a panacea for our society’s pathologies. Democratic political theory tells us that law should be able achieve whatever public purposes we desire, but our everyday experience suggests otherwise. More significantly, the perception that remedial justice is costly, slow and, on occasion, not well-attuned to solving the problems which are presented to courts for adjudication has also come to be widely shared by judges, lawyers, and court officials. Some jurists decry these failures and propose that greater resources should be put into the civil justice system. But others suggest that an expeditious and economical system of civil litigation may be fundamentally incompatible with the inherent values of the judicial process. They believe that maintaining the independence, objectivity and neutrality of the judiciary requires us to trade off the goals of efficiency and accessibility, to channel certain types of disputes away from courts, and even to limit the kinds of remedies that judges are permitted to award.

A key issue that confronts policy-makers in Ontario is, therefore, how to meet the legitimate concern of the public to see law used so as to promote justice and to fairly resolve interpersonal and social conflicts, with the equally legitimate concern that the civil justice system be as economical, speedy and accessible as possible. What, specifically, are the problems that confront the civil justice system today? How many of them are either endemic to our concept of law or inescapable consequences of other values that we visit upon the judicial process? What goals can we reasonably expect the civil justice system to further? And what institutions and processes do we now have available, or can we make available in the near future, to achieve these goals? Developing a strategic plan to address these issues of public policy is, at bottom, the reason for and mission of the Civil Justice Review Task Force.<sup>4</sup>

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<sup>4</sup> It will become apparent later in this Study that although I see the Civil Justice Review as a welcome initiative, I do not believe anything like a “strategic plan” in the usual sense of the term can be developed to deal with efficiency concerns in the civil justice system. The best one can hope for is that decisions are based on reliable information and not on anecdotal evidence or blind prejudice. Should these decisions be first implemented through carefully monitored Pilot Projects, this ought to produce a reasonable degree of coherence over time in the continuing series of *ad hoc* adjustments that are made in order to address specific problems as they arise. I take this sceptical view of strategic planning from Henry Mintzberg, *The Rise and Fall of Strategic Planning*, (Toronto: The Free Press, 1994).

## 2. SCOPE AND FOCUS OF THIS STUDY

The scope of any systemic review of an existing institution is constrained by a number of factors. Some of these are, broadly speaking, internal to the system being examined. Some are external. The former include, notably, the willingness of key participants to join the process and to make available statistics about how the system is currently functioning. Given the joint sponsorship of the Government of Ontario and the Ontario Court of Justice (General Division), and the cooperation of the Law Society of Upper Canada, the present Study presumes that no significant internal constraints limit the issues that can be examined by the Civil Justice Review Task Force. The Study also presumes that these co-sponsors of the Review are committed to financing empirical studies and to pursuing lines of inquiry that may ultimately suggest limitations on, or a transformation of, their roles in the civil justice system.

There are, nevertheless, three major external restrictions on the scope of the Civil Justice Review, and hence on the focus of this Study. First of all, there is the constitution. This Study assumes that current constitutional limitations on the authority of the Parliament of Ontario to organize the court system, to appoint judges, and to legislate in various substantive fields will remain in place, at least for the near future. No matter how much constitutional reform might assist in addressing the civil justice concerns of Ontario citizens—for example, by permitting the assignment of jurisdiction over certain landlord-tenant, consumer or construction disputes to provincially-appointed officials,<sup>5</sup> or by permitting the Parliament of Ontario to reform the law of marriage, divorce, bankruptcy, bank security, and so on<sup>6</sup>—it is unlikely to occur.

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<sup>5</sup> Sections 96-101 of the *Constitution Act, 1867* require that judges of the superior courts of the provinces (which include in Ontario, the judges of the Ontario Court, General Division) be appointed by the Governor General of Canada. These sections have been taken to mean not only that provinces may not create “superior courts” to which they appoint the judges, but also that they may not create provincial administrative agencies to exercise powers which, broadly speaking, were those exercised by the superior courts in 1867. See generally P. W. Hogg, *Constitutional Law of Canada*, 3d ed. (Carswell: Toronto, 1992) at 184-200.

To palliate this latter difficulty, in 1983 the federal government proposed to amend the constitution by adding a section 96B, which would have permitted provinces to “confer on any tribunal, board, commission or authority, other than a court, established pursuant to the laws of the province, concurrent or exclusive jurisdiction in respect of any matter within the legislative authority of the province”. For a discussion of this amendment, which in all events was never adopted, see “Symposium: La réforme des institutions fédérales” (1985) 26 *Cahiers de droit* 217-282.

<sup>6</sup> Two examples will illustrate the problem. Over the past twenty years the Parliament of Ontario has undertaken numerous reforms to the law of domestic relations, the *Family Law Reform Act*, S.O. 1975, c. 41 as amended by S.O. 1978, c. 2 and the *Family Law Act* S.O. 1986, c. 4 being



Similarly, this Study presumes that the Parliament of Ontario will not be inclined to invoke section 33 of the *Canadian Charter of Rights and Freedoms* (the override clause) so as to authorize dispute-resolution procedures that do not conform to the adjudicative model implicitly established by section 7.<sup>7</sup> The view that only adjudication before an independent judiciary can ensure justice has become deeply rooted in popular consciousness and in Canadian political culture since the *Charter* was enacted in 1982. Despite overwhelming evidence about the procedural fairness of, for example, various non-adjudicative administrative decisionmaking processes and consensual or quasi-consensual private arbitrations of the type found in labour relations settings, the model of dispute settlement associated with adversarial adjudication remains the template against which the legitimacy of all other processes is judged. While this Study Paper will occasionally point to possible solutions that might run afoul of existing constitutional arrangements, in general it takes these external constraints on the power of the Parliament of Ontario to reform the civil justice system as insuperable.

Secondly, given the stated mandate of the Civil Justice Review, this Study is directed primarily to problems of civil justice. Of course, the expression civil justice has a variety of possible meanings, even accepting that, for the purposes of the Civil Justice Review, the term is meant to target only processes of dispute resolution having as their main object the settlement of a relatively precisely-

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two of the key pieces of legislation. At the same time, the Parliament of Canada has modified the law of marriage and divorce through the *Divorce Act*, 1968 S.C. 1967-68, c. 24, the *Divorce Act*, 1985 R.S.C. 1985, c. 2 (2nd. Supp.), the *Marriage Act* S.C. 1967-68, c. 24 and the *Marriage (Prohibited Degrees) Act* S.C. 1990, c. 46. The provisions of provincial law and federal law do not always coincide, especially in connection with custody and support of children, spousal support, and division of family property. See generally, P.W. Hogg, *Constitutional Law of Canada* 3d ed. (Toronto: Carswell, 1992) at 645-662.

Similar conflicts arise in connection with the reform of the law of secured transactions, where the regime instituted by the Ontario *Personal Property Security Act* S.O. 1989, c. 16 is often in conflict with that elaborated by the federal *Bank Act* S.C. 1991, c. 46, and *Bankruptcy and Insolvency Act* S.C. 1985, c. B-3, as am. by S.C. 1992, c. 27. See, for discussion of these problems, J. Ziegel, "The Interaction of Personal Property Security Legislation and Security Interests Under the Bank Act" (1986-87) 12 *Canadian Business Law Journal* 73; J. Ziegel, "The Interaction of Section 178 Security Interests and Provincial PPSA Security Interests: Once More Into the Black Hole" (1991) 6 *Banking and Finance Law Review* 343; and A. Roman and M. Sweatman, "The Conflict Between Canadian Provincial Personal Property Security Acts and the Federal Bankruptcy Act" (1992) 71 *Canadian Bar Review* 77.

<sup>7</sup> For a discussion of how section 7 limits the capacity of legislatures to design and implement novel administrative procedures, see J. Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29 *Osgoode Hall Law Journal* 51; and R.A. Macdonald, "Procedural Due Process in Canadian Constitutional Law: Natural Justice and Fundamental Justice" (1987) 39 *University of Florida Law Review* 218-267.

defined conflict, and is not meant to encompass either dispute-settlement by rule-making and political bargaining or other structural features of the civil justice system. Thus, civil justice might be understood as determined by the quality of the parties to a dispute. That is, it could be defined as encompassing all non-criminal litigation (including lawsuits involving administrative agencies), or as encompassing only litigation between ordinary citizens (thereby excluding all lawsuits against the government). Again, the expression might be delimited institutionally. It could, in other words, be defined as including both administrative and judicial processes, or as including only the latter. Still again, the expression might be understood to be restricted by the object of the litigation. Thus, it might be taken to include all litigation that falls within the jurisdiction of the civil courts, or it might include only litigation about transactions and interpersonal conflicts. These various meanings, the political reasons why one of the other is proclaimed as “true”, and the implications for the Civil Justice Review of adopting one or the other, will be explored later in this Study.<sup>8</sup>

It also bears notice that the frontiers of the civil justice system, whatever definition one adopts, are both shifting and permeable. What is today a matter of the civil law (understood most narrowly as transactional litigation between private parties in a judicial forum)—for example, consumer contract remedies for unconscionable business practices, or procedures for the collection of alimony or child support—could well be a matter of administrative regulation or even quasi-criminal proscription tomorrow. Many of the key issues of efficiency, economy and accessibility that confront the civil justice system are, moreover, equally relevant to the criminal and quasi-criminal justice field, to *Canadian Charter of Rights and Freedoms* and other constitutional litigation, and to the administrative processes of highly specialized regulatory agencies such as labour relations boards and securities commissions. While civil justice problems in newly created fields of administrative law will be addressed in passing, the focus of this Study will be on those everyday non-criminal disputes in fields of law that for the past century have typically been litigated before the Common law courts: family law, real estate transactions, personal property, contracts, torts, successions,

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<sup>8</sup> The distinction between the civil law and other branches of the law such as commercial law and public law tends to be much more highly developed in systems of law in the romano-germanic tradition, where different judicial bodies are assigned authority to deal with each of these legal fields. Whether these continental distinctions are analytically clean or whether they are as much as anything a matter of convention and experience is, of course, a matter of continuing debate. For a brief discussion, see A. Von Mehren and J. Gordley, *The Civil Law System* 2d ed. (Boston: Little Brown, 1977), chapters 1 and 2. For the position in Quebec, where understandings of the relationship between public law, private law and commercial law more closely track those in Ontario, see J.E.C. Brierley and R.A. Macdonald, *Quebec Civil Law* (Toronto: Emond-Montgomery, 1993), nos. 1-3, 31-35, 42-60 and 761-780.

employment law, landlord and tenant law, consumer law, insurance law, commercial law, agency and partnerships, corporate law, and like matters.<sup>9</sup>

A final external constraint on the scope of this Study flows from the fact that the Civil Justice Review Task Force is operating under a short reporting deadline and has, therefore, divided its investigation among several sub-groups, each with a narrow mandate. The general approach of this Study will, consequently, be to explore the viability of various incremental changes to the system of civil dispute resolution in Ontario that could conceivably be put into place within the next year or so. Reworking the civil justice system from the ground up (even were this possible) is not a task undertaken here. A concern with generating discussion about proposals for short-term legislative action gives an experimental flavour to many of the ideas presented in this Study. Global reform demands extensive empirical information and a process of political consensus-building that sectorial or localized initiatives do not. Global reform also demands a certainty (or at least a singularity) of purpose not required when Pilot Projects are being mounted.

A complementary aspect of this third limitation flows from the limited purposes being pursued in this Study. It is not, like the Report of the Quebec *Groupe de travail sur l'accessibilité à la justice*, a conspectus of issues relating to civil justice. However important it is to rethink approaches to, for example, legal aid, intervenor funding, prepaid legal insurance and public legal education, these topics do not fall within this Study. However important it is to consider the effects of adjustments to civil procedure—contingency fees, revised cost-shifting rules, case management, small claims courts, class actions—consideration of these techniques for achieving a more accessible justice also falls outside the present inquiry. However much the specific design and redesign of administrative agencies may contribute to economies in, for example, fields of mass adjudication, the detail of institutional design is not a topic addressed here. This Study is, in brief, an examination of the theory and practice of dispute resolution—both by courts and by processes of A.D.R.—a topic that in other circles has been characterized in terms of “the choice of governing instrument”.<sup>10</sup>

These two aspects of this third limitation—the temporal and the substantive—do not mean that truly fundamental issues will be ignored, or that

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<sup>9</sup> One of the earliest attempts to define the scope of the civil law in North America was that of O.W. Holmes, Jr., *The Common Law* (Boston: Little Brown, 1881). The Introduction to this work reveals how highly uncertain the frontiers of the subject really are, and how much their fixing is determined by the political beliefs of any given author.

<sup>10</sup> For an example of this type of characterization in the literature of economic analysis of governmental regulation, see J.R.S. Prichard, ed., *Crown Corporations in Canada: The Calculus of Instrument Choice* (Toronto: Butterworths, 1983).



suggestions for further lines of inquiry will be avoided, or even that proposals with a longer-term implementation date will be left unexplored. Quite the contrary. The Study attempts to place the current system of civil disputing, and the specific issues raised here for consideration, in their larger context.

### 3. SOME PRELIMINARY ISSUES

The Preamble to the Terms of Reference of the Ontario Civil Justice Review implies that Ontario once had a workable and efficient system for resolving civil disputes, but that in recent years this system has broken down.<sup>11</sup> At a time of rampant scepticism in North America about the capacity of public institutions to deal with the problems confronting society, such assertions are intuitively plausible. We do want to believe that at some prior time courts were less crowded, trials were more expeditious, lawsuits were less expensive and civil justice was more accessible to all citizens. Yet we also have to admit that we really do not have hard evidence to back up these intuitions. The comparative horizon we adopt tends to vary to suit our purposes; the facts relied upon are largely anecdotal and impressionistic; and the inferences to be drawn from these facts are often open to diametrically opposed interpretations. For these reasons it is helpful to pose a few questions that reveal the tacit (and uncertain) assumptions upon which the decision to establish a Civil Justice Review has presumably been grounded.

One such foundational inquiry is to ask what, exactly, is the problem or set of problems that the Civil Justice Review is meant to address. Several quite different possibilities suggest themselves. It may be that the public is genuinely distressed by the cost of civil litigation. But by far the largest component of the expense of a lawsuit is legal fees. Hence, it is difficult to see how increasing efficiencies in the court system will have much impact on reducing costs for litigants. If, however, the cost to the taxpayer of maintaining the present civil justice system is an overriding concern, then strategies for reducing litigation, or streamlining the judicial process might well be worth pursuing. This assumes, of course, that on any social cost/benefit analysis, the savings to the public generated by rejigging or privatizing civil litigation are not more than compensated by additional social costs flowing from the reform—an assumption that can only be tested after the fact.

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<sup>11</sup> See *Ontario Civil Justice Review: Terms of Reference*, a document dated April 5, 1994. To a lesser extent, these themes are taken up in a Memorandum setting out the initial statement of tasks to be undertaken by Fundamental Issues Group, a document dated April 19, 1994. An edited version of these documents is reproduced in Appendix I and Appendix II, respectively.



Again, take the question of delay. It may be that there is a widespread public perception that the litigation process is too lengthy. But how much delay can be attributed to court over-crowding. If, for example, a contract action is filed just before the limitation period expires, and if pre-trial proceedings take another two years, the two year delay from the time a certificate of readiness is issued until a case comes on for trial is not the major component of the almost ten-year delay between the event giving rise to the action and the judicial judgment.

There is some suggestion in the Terms of Reference of the Civil Justice Review that a major policy concern is court overcrowding in itself. If this is, in fact, a preoccupation, two main approaches to a solution are possible: one can either increase supply, or one can reduce demand. Both are not self-evidently a solution. Increasing supply by building more courtrooms and appointing more judges will surely increase the cost of the civil justice system to the taxpayer (although how much is matter of some debate), and may only provide temporary relief. Instituting significant efficiencies within the system may well reduce the time individual judges spend on individual cases, but is also likely only to provide temporary relief. We have all had the experience of watching demand quickly increase to meet the supply of public services in fields as diverse as health care and automobile expressways. Conversely, decreasing demand for judicial services might well require a conscious decision to keep the costs of litigation relatively high and to keep delays relatively long, in order to give potential litigants incentives to take their disputes elsewhere. And, in any event, there is no assurance that any such decisions will deflect from the system the kinds of cases that currently occupy most judicial time.

Immediately below, a key dimension of deciding between increasing supply or decreasing demand—the necessary trade-offs among the goals of efficiency, economy, expedition and accessibility—will be considered in the light of whose perspective on the civil justice system is being adopted. For the moment it is sufficient to note that because we are uncertain about what our problem or problems are, there is no obvious policy prescription for addressing them.

Still another uncertainty of purpose flows from the difficulty of separating questions of substance and process. It may be that the public is more concerned with the substance of justice than with the specific procedures put in place to achieve it. If so, true access to justice may well be something different than enhanced accessibility of the judicial system. Yet, there are many studies suggesting the opposite. The outcome of a trial, even in cases where one or both parties feel that “true justice” has not prevailed, is seen as less important than the fairness of the process. Indeed, to feel that one has been listened to impartially and conscientiously, even if this imposes significant additional costs and delays,

is a central litigant value.<sup>12</sup> In other words, it is important not to prejudge the outcome of the Civil Justice Review by assuming that, all things being equal, the best solution to problems with the civil justice system would be ensure an efficient, timely, and inexpensive judicial process.<sup>13</sup>

Closely connected with this first inquiry is a second foundational question: what evaluative perspective is, or should be, adopted? This is not an easy question to answer. For example, should the perspective be that of the participants in the judicial system, or that of the citizen who may never even get near a civil court in her or his life? If the former, should the perspective be that of the financer of the system (the Government of Ontario), that of the court official (the clerk, master or judge), that of the professional participant in the judicial process (the lawyer), or that of the users of the system (the plaintiff and the defendant)? If the latter, how does one weigh the input of consumers, soon to be ex-spouses, recipients of governmental entitlement programmes, heirs, tenants, landlords, employers, merchants, employers, children, social activists and industry lobby groups? Again, should the perspective be that which focuses on the justice of individual disputes or that which focuses on the more general issues of social justice of which an individual dispute may only be a small reflection?

These competing perspectives on what it means to improve the civil justice system can be grouped into two main categories. One such perspective, typically that of the internal participant in the litigation process, understands the key issues to be those of distribution of disputes or administration of the system: given such-and-such a demand for judicial adjudication, how can the demand best be met? Another perspective, typically that of users and non-users of the system, understands the key issues to be those of allocation and recognition: is the legal process in any of its forms the optimal vehicle for dealing with different kinds of interpersonal and social conflict?

A few admittedly simplified examples will illustrate why the question of perspective is important. From a purely managerial perspective, if the problem were seen to be that courts are overloaded and judges are overworked, in addition to simply increasing the number of courts and judges, one could “solve” the problem of delay by transferring a large volume of cases to other dispute resolution settings (such as an administrative agency charged with managing a no-fault automobile accident insurance scheme). Neither strategy is very new, and

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<sup>12</sup> See especially, T. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990).

<sup>13</sup> For a discussion of the often competing goals that arise in connection with reform of the civil justice system, see R A. Macdonald, “Access to Justice and Law Reform” (1991) 10 *Windsor Yearbook of Access to Justice* 287.

the second has been actively pursued in Ontario with workers compensation, employment standards, labour relations, rent control, and other administrative regimes. More radically, the case-load problem could be overcome just by repealing the statute or the Common law rule that gives rise to the rights being so frequently litigated. If, for example, courts are clogged with construction lien cases, pressure could be relieved by repealing the *Construction Liens Act*. From the perspective of the potential litigant, however, these various solutions do not necessarily “solve” the problem of obtaining efficient, expeditious and accessible civil justice.

Perspective also comes into play when the question of cost is considered. A system of user-pay may well go a long way to solving the cost-of-justice problem for the government, but it does so at the expense of individual, and (given current cost-shifting rules) especially losing, litigants. Conversely, a *judicare* system (that is, a comprehensive legal insurance plan on the model of medicare) may well go a long way to solving the cost-of-justice problem for individual litigants, but it does so at the expense of society as a whole.

Another dimension of the perspective problem is systemic. Because we tend to see the caseload within the civil justice system simply as an aggregation of individual disputes, recommendations typically envision remedying symptoms—volume, cost and delay in litigation. The question of cause, in part because it is so difficult to determine, is rarely addressed. Public policy debates thus become polarized around a false choice between individual and social (systemic) interests. In order to address fully how well the civil justice system is working, then, it is important to bear in mind that judgments about the appropriateness and desirability of various recommendations will typically depend on whose perspective is being adopted.<sup>14</sup>

The third foundational inquiry that highlights the assumptions underlying the Civil Justice Review raises equally difficult questions. What are the data upon which various claims about current performance of the civil justice system are based? The Preamble to the Terms of Reference of the Civil Justice Review states that “[t]raditionally, in Ontario, members of the public have resolved their civil disputes through the court process”. Are we certain that most civil disputes wind up in litigation? Do we really know what percentage of potential civil disputes are never brought to court, or even to a lawyer’s attention? How many are solved privately by disputing parties themselves, or with the assistance of a friend or other disinterested third person? Presumably, if it were to turn out that 95% of civil disputes were resolved informally, our expectations of the litigation

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<sup>14</sup> I have attempted to illustrate the pertinence of this inquiry in a review of the work of the Quebec Task Force on Access to Justice: see R.A. Macdonald, “Accessibilité pour qui? Selon quelles conceptions de la justice?” (1992) 23 *Cahiers de droit* 457.



process would not be the same as if only 20% of civil disputes were resolved informally.<sup>15</sup> Similarly, if it were to turn out that vengeance rather than compensation, or principle rather than specific redress, were primary plaintiff motivations we might well want to keep such disputes in the domain of public, rather than private or even self-help, resolution.<sup>16</sup>

The Preamble also declares that the “adversarial method of dispute resolution [...] has ultimately led to justice”. This is another assertion of fact. Once more, it is uncertain whether there is an evidentiary base supporting the proposition. While we do not know with any assurance how many users of the civil justice system in Ontario think that it actually produces a result that they would characterize as just, studies from elsewhere in North America suggest that the Preamble’s claim may be exaggerated. If it were to turn out that a significant percentage of court users or potential court users do not think that the adversarial system leads to the attainment of justice, this fact would, one assumes, influence our perception about whether solutions that provide alternatives to the courts should be developed and promoted.<sup>17</sup>

Still again, the Preamble observes that “[i]n recent times, ... justice has come at great expense to the litigants, and, too often, after numerous and lengthy delays.” No doubt, civil justice in courts today is expensive, and is usually not expeditious. Yet it is difficult to proclaim, on any comparative measure, that the judicial process is more expensive or slower than previously. What statistics do we have about the cost of litigation relative to the cost of food, or the cost of legal fees as a percentage of mean household income—either now, or fifty years ago, or one hundred years ago? And what comparative statistics do we have about the length of the civil litigation process in past decades? Are we even confident that we know what phases of the litigation process—pre-trial, trial, post-trial pre-judgment, post-judgment—cause the most delays and are the most costly to litigants? If anecdotes and impressions are the main basis of our judgments, we could just as well take the Dickensian tale of *Jarndyce v.*

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<sup>15</sup> The relationship between rates of litigation and rates of disputing is analyzed in M. Galanter, “Reading the Landscape of Disputes: what we know and don’t know (and think we know) about our allegedly contentious and litigious society” (1983) 31 *UCLA Law Review* 4.

<sup>16</sup> See S. Merry and S. Silbey, “What Do Plaintiffs Want: Re-examining the Concept of Dispute” (1984) 9 *Justice System Journal* 151.

<sup>17</sup> See G. Woodman, “The Alternative Law of Alternative Dispute Resolution” (1991) 32 *Cahiers de droit* 3.



*Jarndyce* as evidence of the failings of the civil justice system a century and one-half ago.<sup>18</sup>

And again, even if it were true that for those litigants who go to trial the process today is slow and costly in comparison with previous decades, this may not tell us that a problem exists. Delay and cost may be the result of better legal representation. That is, they may reflect greater access to justice because more people are seeking professional help in vindicating their grievances rather than simply “lumping it”. Delay and cost may also result because the stakes are higher. A defendant may well feel obliged to invest substantial resources in a particular lawsuit so as to avoid an unwanted (or, in its eyes, dangerous) precedent. With improved law reporting services and increased media attention to the legal system, cost and delay for one litigant might well translate into cheap, expeditious justice for many others who can negotiate a settlement by wielding the judgment in support of their claims. How, then, does one measure cost and delay so as to factor the savings to future “free riders” into the equation?

Finally, most of the few official predictions and prescriptions that do exist appear to be based on aggregating and extrapolating data from individual cases without much attention to any differentiating features of these cases. It is, however, far from obvious that all civil disputes are of the same character. Do we have any clear idea about what kinds of cases, if any generalizations may be made at all, use up the most judicial time and court resources? Imagine that there were a great discrepancy between the **mean**, the **median** and the **modal** cost and duration of civil disputes; imagine also that one or two classes of case—say, divorce and medical malpractice actions—consumed a highly disproportionate share of dispute resolution resources. This might suggest that the issue to be addressed is not the civil justice system in its entirety, but rather the way in which the system handles certain kinds of disputes. A similar observation can be made about the geography of civil disputes. While the average lawsuit might well be costly and slow, do we know that the problems of expense and delay experienced in large cities are replicated in every county?<sup>19</sup> Presumably, if in disaggregating the data about civil disputing we discovered such discrepancies,

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<sup>18</sup> One of the most careful studies of theories of dispute processing and the evidence cited in support of such theories is that of John Esser, “Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know” (1989) 66 *Denver University Law Review* 499.

<sup>19</sup> As a rudimentary example of the kinds of subject- and geography-related statistics that can be generated as an aid to disaggregating data, see *Court Statistics Annual Report: Fiscal Year 1993/1994* (Toronto: Ministry of the Attorney General, 1994), Report No. A-20.

we would not be nearly as confident in declaring that the system of civil justice in Ontario today is, on the whole, costly or inefficient.<sup>20</sup>

#### 4. THE NEED FOR EMPIRICAL EVIDENCE

The above observations suggest that three of the key problems likely to bedevil attempts to improve Ontario's civil justice system are a relative uncertainty about what the central questions are, a lack of consensus about which perspective or perspectives should be adopted for assessing how efficient and accessible the system is, and a general absence of detailed information either about citizen perceptions, or about actual rates of civil disputing both in courts and elsewhere. This third point is especially troubling. We really don't know what most citizens expect of the civil justice system across the various fields of law that are currently managed through the courts. At best we have a sense (on the basis of sporadic public surveys) that certain distinct groups of citizens in Ontario are less than satisfied with outcomes of the litigation process. And we really don't know much about overall patterns and rates of civil litigation. At best we have (primarily as a result of data from the Case Management Program) a snapshot of the history of individual civil disputes once a claim is filed in court.

Neither of these existing evidentiary sets is particularly informative. Unless we are able to determine that decisions by citizens not to invoke the legal process are made on the basis of the inadequacy or inappropriateness of the available judicial remedies, we cannot claim that the litigation process is unjust. To take an analogous medical example, absent evidence about whether citizens feel the medical treatment they receive from licensed doctors is adequate or appropriate, we have no way of knowing what the true demand for health care might be. Moreover, unless we have reliable correlations between the number of civil disputes that arise and the number of lawsuits filed, we have no basis for concluding that the system is inaccessible. To take another medical example, no one would claim that rates of disease can be determined on the basis of rates of visits to doctors, or the quantity of OHIP billings; still less can they be determined by reference to the number of hospitalization. Similarly, no one would assert that the amount of crime is equivalent to the number of reported crimes; still less is the amount of crime equivalent to the number of charges laid; and even less still, to the number of prosecutions brought or convictions obtained after a trial. The task facing the Civil Justice Review Task Force is further complicated because, not only do we have little reliable data about these two

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<sup>20</sup> The possibility that our perception of problems with the civil justice system arises because we do not sufficiently disaggregate data is explored by Marc Galanter in "The Day After the Litigation Explosion" (1986) 46 *Maryland Law Review* 3.

components of civil disputing today, we have almost no information of any description about civil justice in previous decades against which to compare contemporary statistics.

While this absence of meaningful data is regrettable, it is not entirely irremediable.<sup>21</sup> Admittedly, generating information about the use and non-use of the civil justice system, about citizen attitudes towards the system, about the socio-demographic characteristics of plaintiffs and defendants, and about the subjective evaluations that influence decisions by individual citizens about whether or not to see a lawyer or file an action, requires the mounting of an independent, voluntary, scholarly research project and the application of sophisticated social scientific survey methodology. But these types of studies have been undertaken in both the United States and elsewhere in Canada.<sup>22</sup> There is no insurmountable obstacle to their being replicated in Ontario. Indeed, a number of smaller studies of consumer complaints and small claims court use addressing some of these issues have already been published.<sup>23</sup> One might even think that research studies directed to gaining an understanding of citizen perception, and use of, the civil justice system would be a high priority for funding by the Law Foundation of Ontario.<sup>24</sup>

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<sup>21</sup> Since the mid-1980s Statistics Canada has co-sponsored the Centre for Justice Statistics, which collects and co-ordinates data about police activity and the criminal justice system. Although budget cutbacks have curtailed this activity, it does provide a model for generating civil justice statistics. A much more elaborate system of justice statistics has existed in France since 1980 under the auspices of the French Ministry of Justice. For a brief review, see B. Munoz-Perez, "Les statistiques judiciaires civiles, sous-produit du répertoire général des affaires civiles" (1993) 25 *Droit et Société* 351.

<sup>22</sup> See, for two leading examples, S.E. Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (Chicago: University of Chicago Press, 1991), and S. Silbey and P. Ewick, *Differential Use of Courts by Minority and Non-Minority Populations in New Jersey* (Trenton: New Jersey Judiciary Supreme Court Task Force on Minority Concerns, 1994). Both are remarkable studies that contain impressive bibliographies. See also R.A. Macdonald, S.C. McGuire, and S. Phelan, "Where Have All the Plaintiffs Gone? A Socio-demographic Survey of Plaintiffs in the Montreal Small Claims Court" (unpublished, 1993).

<sup>23</sup> One such study is that by K. Hildebrandt, P. Mercer and B. McNeely, "The Windsor Small Claims Court: An Empirical Study of Plaintiffs and Their Attitudes" (1982) 2 *Windsor Yearbook of Access to Justice* 87. For a more comprehensive review, see W. Bogart and N. Vidmar, "Problems and Experience with the Ontario Civil Justice System: An Empirical Assessment" in A. Hutchinson, ed., *Access to Civil Justice* (Toronto: Carswell, 1990) at 1.

<sup>24</sup> In the mid-1970s researchers in the United States and in Quebec undertook two extensive surveys that could be used as models. See B. Curran, *The Legal Needs of the Public — the final Report of a National Survey* (Chicago: The American Bar Foundation, 1977) and C. Messier, *Les mains de la loi: une problématique des besoins juridiques des économiquement*



As for statistical evidence about the rate and character of civil litigation, the will to act is all that has been lacking. For almost twenty-five years, intense efforts have been directed to improving different aspects of the civil justice system—from the McRuer Report, through the development of the Ontario Legal Aid Plan, the creation of Small Claims Courts and Class Actions Procedures, and the establishment of Case Management Systems, to contemporary proposals respecting the function of the civil jury. How much better our analysis and recommendations today would be if we had, beginning then, systematically collected data about civil disputing. Since the recommendations likely to issue from the Civil Justice Review Task Force will not resolve all the problems with the present system of civil disputing, and since some of these recommendations will likely be revisited, it can reasonably be assumed that the Civil Justice Review will not foreclose future attempts to improve Ontario's civil justice system. The most important contribution—incremental and immediately able to be implemented—that the Civil Justice Review Task Force could make to producing a more economical, efficient and accessible civil justice system for Ontario would be to ensure that the next Civil Justice Review has a meaningful set of longitudinal statistics upon which to draw.<sup>25</sup>

Much of the most important information needed to create such a statistical set can easily be derived from documents already in the public domain. What is now required is to make the recovery and processing of this information easier to undertake. Take, for example, data about civil litigation in the regular court system. Consideration should be given to supplementing the form by which lawsuits are initiated—the Writ of Summons—with a machine-readable cover sheet indicating, for example, the parties to the action, the character of the action, the issue (or amount) in dispute, the date the cause of action arose, the date of filing, and other like information. A similar machine-readable form could be required for the statement of defence and for all incidental or interlocutory documents, as well as for all desistments, confessions of judgment or settlements (subject, of course, to confidentiality agreements as to damages payments). Finally, at the time that a judge endorses the record when entering judgment, another machine-readable form—indicating the dates and duration of the trial, the disposition, the date of judgment, and the costs award—could be completed for

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*faibles au Québec* (Montreal: Commission des services juridiques, 1975).

<sup>25</sup> While judicial statistics are central to any empirical investigation of the civil justice system, the data collection effort should, ideally, extend as broadly as possible, and should include public agencies—landlord-tenant, consumer protection, business practices, ombudsman, employment standards, workers compensation, labour relations, human rights commissions, etc., as well as private bodies—better business bureaus, media consumer hot-lines, insurance company statistics, and so on. See, generally, the papers by D. Hensler, Director, RAND Institute for Civil Justice, and the plea by M. Galanter, B. Garth, D. Hensler and F. Zemans, "How to improve civil justice policy" (1994) 77 *Judicature* 185.



insertion into the file. Over time, such a procedure would lead to a reasonably comprehensive, although rudimentary, data set about the litigation process that a skilled researcher could then extract, correlate and analyze.

The collection of civil justice statistics is, of course, not an end in itself.<sup>26</sup> One of the purposes of empirical research in this context is, of course, to produce better law reform. Statistics themselves cannot replace normative judgments. In other words, the Parliament of Ontario will still have to decide what policy prescriptions follow from the data collected. Data may inform judgment; it cannot replace it. What is more, as with all data analysis, much depends on the questions asked. The limitations of the proposed inquiry should thus be acknowledged. The socio-demographic information collected would not be as complete as that generated from a full-fledged case-management system, and would not reveal patterns of civil disputing in cases where no Writ of Summons is ever issued or no administrative file is ever opened.<sup>27</sup> Nor, given that the categories by which the data is sorted are drawn from the law, would it provide much detail as to the true nature of the human conflict underlying the lawsuit.<sup>28</sup> But it would at least provide the beginnings of a record of the civil disputing process in Ontario at a minimum cost to litigants and the government. The data collected could then be made available to scholars interested in analyzing key variables and correlating the different determinants of the civil justice system.

## 5. GENERAL ORGANIZATION AND OUTLINE OF THIS STUDY

The Civil Justice Review Task Force has been given a mandate of almost debilitating proportion. The questions facing the Interim Task Group in its attempt to examine and evaluate possible efficiencies that can be brought to bear on the judicial system as it currently exists are intricate. Quite apart from them, the Fundamental Issues Group is asked to think about whether the existing distribution of civil disputes—between public and private mechanisms, and

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<sup>26</sup> A careful examination of the assumptions underlying the collection of civil justice statistics, the character of the data that is produced, and its possible uses by law reformers may be found in the symposium: "Les produits juridiques de l'appareil judiciaire comme objet sociologique" (1993) 25 *Droit et Société* 329-415.

<sup>27</sup> For an attempt to use statistical analysis to locate "missing" plaintiffs in one particular setting—the Montreal Small Claims Court—see R.A. Macdonald and S.C. McGuire, "For Whom the Court Toils: Lumping It and Stuffing It As Alternative Strategies for Dealing With Unresponsive Law" (unpublished, 1994).

<sup>28</sup> See the magnificent analysis of this problem with judicial statistics by C. Beroujon and S. Bruxelles, "Règles juridiques, catégories statistiques et actions sociales" (1993) 25 *Droit et Société* 369.

within publicly funded mechanisms between courts and other bodies—can be modified so as to improve the civil dispute-resolution process. This is an important task, and much of this Study will be devoted to raising questions about how it might be approached.

Nevertheless, as the *Groupe de travail sur l'accessibilité à la justice* of the Quebec Ministry of Justice came to discover between 1989 and 1991, the question of allocating civil disputes between various types of dispute-resolution agencies is almost the last question that needs to be addressed.<sup>29</sup> That is, the mandate of the Ontario Civil Justice Review seems to be, at least in part, conceived on the basis of potential remedies rather than an analysis of particular types of problem that courts are not handling especially well. The logic of the A.D.R. mandate of the Review is this: in a general way, courts are busy; alternatives to courts exist; let us attempt to find the types of cases that can be efficiently delegated to them in the hope that this will remove from the courts a significant part of the judicial workload. Even were this the most appropriate strategy to pursue—identify your solutions before you identify your problems—it presupposes considerable prior research. Long before decisions about which bodies should be given authority to resolve civil disputes can be made, one needs to develop an understanding about how these civil disputes come to be generated out of interpersonal and social conflict, and about the different means by which they can be given a specific type of legal expression. In order to bring these preliminary questions to the surface, this Study will be organized in two separate parts, each of which is divided into two sections.

Part One will consider how it is that legally recognized civil disputes arise, and will review the role of legislatures, courts and the legal profession in giving them shape. While interpersonal and social conflicts are clearly present in modern society, whether these conflicts are officially acknowledged—that is, whether they exist as civil disputes—depends on a complex array of historical and political factors. We can easily see that the decision to characterize a conflict or an act as a crime is very much a question of legislative or judicial choice. But this is equally true of civil disputes. An intentional punch on the nose evidences an interpersonal conflict. Whether it is also a “common assault” under the *Criminal Code*, and whether it is actionable in tort as a “battery”, however, are not inherent in the act of punching itself. Each of these conclusions flows from a conscious decision by public officials to characterize the punch in either or both of these ways. In a like manner, one can see that the decisions whether or not to consider trade unions as criminal conspiracies, and whether or not to provide civil remedies for illegal strikes or lockouts are not inherent in the social conflict between employer and employees.

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<sup>29</sup> See *Jalons pour une plus grande accessibilité à la justice*, the Report of the *Groupe de travail sur l'accessibilité à la justice* (Quebec: Ministère de la justice, 1991), conclusion.

An initial question is, therefore, are there any lessons that can be learned about when the legislature or the judiciary should go about creating civil disputes out of the everyday stuff of interpersonal and social conflict? Are there some such conflicts that, for political reasons, are better left unrecognized as civil disputes? Are there some that citizens themselves do not want to see recognized as a legal dispute because, for example, they doubt the capacity of the law to deal effectively with them? The point here is to consider how much of the cause of the problems which have given rise to the Civil Justice Review can be traced to decisions by the legislature and courts about the scope and function of law, rather than to problems with the civil justice process itself.

Part One will also look at the different ways by which the legislature and the courts give concrete form to civil disputes once the decision to recognize them has been taken. It raises such questions as when should the legislature decide to recognize an interpersonal or social conflict by means of a very detailed rule, and when should the problem be addressed by means of a general principle? A central aspect of this inquiry is to consider whether it is possible to reduce litigation through greater use of detailed definitions in the statute book. The question when ought the legislature to attempt to reform the Common law by statute, rather than letting the courts develop new principles on a case-by-case basis is also considered. If the legislature takes the former approach, when should it simply amend a specific Common law rule, and when should it enact a more general, codifying statute? Still other issues confronting the legislature concern the manner in which legal entitlements are presented, and the decision-making forum—court, administrative tribunal, private arbitrator or mediator—for determining these entitlements. Because these latter decisions bear on the very question delegated to the Civil Justice Review Task Force, their consideration will be deferred to the second Part of this Study.

In so far as the courts are concerned, one might ask what impact either relaxing or tightening the rule of *stare decisis*—that is, the rule that lower courts must take the decisions of higher courts to be binding upon them—would have on rates of litigation? In other words, the legislature must consider whether any kind of law reform would reduce, simplify or expedite litigation by clearing up obscurities, ending judicial differences of opinion, or bringing the law more in line with citizens' expectations. After all, how much litigation is caused by real uncertainty in the law, and how much is strategic? Here, the role of the legal profession in stimulating or discouraging civil litigation cannot be discounted. Would excluding lawyers from certain dispute resolution institutions—as for example, Quebec has done with its Small Claims Court—reduce the amount of civil litigation? Conversely, would excluding lawyers increase litigation by reducing the incidence of out-of-court settlements? To what extent do lawyers help to shorten the trial process by allowing the legally relevant facts of a conflict to be succinctly presented and the issues in dispute to be narrowed and



sharpened for adjudication? Throughout, the underlying inquiry is whether the way in which legal entitlements are formulated by courts and legislatures has any impact on litigation tendencies, and whether alternative formulations of these entitlements will reduce the volume and length of litigation without at the same time reducing the justice of the system.

Part Two of this Study then examines the range of factors that might go into decisions about how, where and when to process certain types of civil disputes, once the legislature has decided to give them legal expression. This opens up a vast inquiry. A preliminary matter is to decide whether some form of pre-emptive legal regulation could best serve the interests of civil justice. Would, for example, the licensing of door-to-door sellers, and the provision of a cooling-off period in which purchasers could cancel contracts signed with such sellers be a more effective way of dealing with consumer disputes than just giving consumers a right to sue for fraud or misrepresentation? Would occupational health and safety regulation and the imposition of differentiated worker's compensation levies based on an industry's risk-rating or an employer's lost-time record be a better way of dealing with workplace accidents than simply giving injured worker's access to a compensation fund? The point being noted here is that the decision to treat an individual or social conflict as legally cognizable, does not automatically commit the legislature to accepting the inevitability of such disputes being characterized in such a way as to lead to civil litigation.

Contemplating the role of pre-emptive strategies invites, at last, consideration of the inquiry specifically mandated to the Fundamental Issues Group of the Civil Justice Review. When might public processes of dispute settlement be best performed by officials other than judges and in institutions other than courts? When might non-judicial adjudication—for example, adjudication by an administrative tribunal or consensual arbitration—be preferable to judicial adjudication? When might it be suitable to ask courts to perform dispute resolution tasks—such as mediation, or the allocation of economic resources—that are not really adjudicative? When might voluntary or imposed private dispute settlement processes be preferable? And in all cases, what kinds of mechanisms should be put in place to ensure that principles of due process—independence, absence of bias or interest, opportunity fairly to present one's case, consistency of result, openness and accountability—are respected to the appropriate degree by these various non-judicial decision-makers?<sup>30</sup>

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<sup>30</sup> Given the constitutional role of the superior courts as the ultimate supervisors (either by their jurisdiction in appeal or by their jurisdiction in judicial review of inferior and domestic tribunals) of legal decision-making, it is difficult to imagine such mechanisms and processes not ultimately leading to litigation before the courts. Previous attempts to institute alternatives to judicial review have been, without exception, found unconstitutional. For a brief discussion, see P.W. Hogg, *Constitutional Law of Canada* 3rd ed. (Toronto: Carswell, 1993) at 184-200.



These are difficult questions, especially because it is far from certain that the decision as to the appropriate dispute resolution forum and the optimal dispute resolution procedure should be taken by the legislature or by litigants themselves. Moreover, in part because our constitutional system makes the ordinary judicial process the default regime of dispute settlement it is, in the eyes of many potential litigants, the most desired dispute-resolution mechanism. For this reason, the normative criteria to be applied in deciding which types of civil dispute merit full judicial treatment are likely to be highly contentious. Inevitably, the arguments for particular type of criterion—a monetary criterion, a party-dependent criterion, a remedy dependent criterion, or a legal subject-matter criterion, for example—will be incommensurable.

Quite apart from the question of who makes these determinations and on what basis they are made, how one structures incentives within the ordinary system of litigation will have a great bearing on the cost and delays associated with civil disputing. For example, whether class actions are encouraged or discouraged, whether or not simplified procedures like those followed in Small Claims Courts are extended to other forms of litigation such as commercial contract disputes, whether cost-shifting rules are repealed or enhanced, and whether potential plaintiffs are entitled to obtain punitive (or, as in securities litigation in the United States, treble) damages can all be predicted to have an effect on rates of civil litigation. It follows that in addition to mandatory streaming of certain civil disputes into institutions other than courts, the legislature can influence patterns of litigation by basic design decisions such as selectively structuring procedures and rules of evidence, and selectively assigning remedial possibilities. The gravamen of this second Part of the Study is to consider whether there can be principled criteria—a check-list of factors—that the legislature, the courts or even parties to a dispute and their counsel can use to determine whether the kind of problem they have can be most effectively and efficiently solved in one forum or another.

## **6. WHAT IS REALLY AT STAKE IN THE CIVIL JUSTICE REVIEW?**

The Task Force conducting the Civil Justice Review was created in response to a number of perceived difficulties with the system of civil disputing in Ontario. But, as the previous paragraphs have intimated, it is not at all clear that any of the identified problems are, in fact, the problems that need to be addressed. Take a medical analogy. If one has a searing headache, one's first concern is likely to be pain relief. Few people, however, are content merely to palliate symptoms, especially if the headache is particularly severe, or is recurring. Finding out what is causing the headache is the more fundamental issue. The precipitating event for the Civil Justice Review—doubts about the efficiency, cost, timeliness and accessibility of civil justice—is the legal

equivalent of the headache. No one denies its reality. Equally, no one denies that it is more a symptom than a cause.

Unfortunately, to date, we have neither a good fix on the cause of our civil justice headache, nor even a good sense of the different kinds of headaches there are, and from what specific kind or kinds we are now suffering. More troubling still, there is neither consensus about whether we should even do anything at all about our civil justice “headache”. And, if that were not enough, there is no clear evidence that we can take some fundamental or global steps to do something about it even if we wished.

Trying to determine an optimal configuration of judicial and non-judicial dispute resolution mechanisms, of publicly-funded and private-funded institutions, and of adjudicative and non-adjudicative processes, and trying to determine the optimal configuration of incentives so as to induce citizens to select one or the other of these alternatives is the major law reform issue confronting the Civil Justice Review. But, as noted earlier, it is unclear upon what basis it can be predicted that any solution will achieve the desired result.

Before one can determine whether a particular individual or social conflict should necessarily be channelled anywhere, one has to ask why the legislature has chosen to formulate a certain social problem in a given way. Of course, the Civil Justice Review Task Force has no explicit authority to make recommendations either as to which interpersonal and social conflicts should be turned into civil disputes, or as to how these disputes should be legally formulated. It can, nevertheless, demonstrate the importance of these questions to its official mandate, and illustrate why the Parliament of Ontario ought to attend, at the point of enactment, to the civil disputing consequences of any particular piece of legislation. In other words, the Civil Justice Review ought to be not just the occasion for proposing means to make the civil justice system in Ontario more economical, expeditious and accessible. It ought also to be a vehicle for generating public debate about the forms and limits of legal entitlement, and about the forms and limits of diverse conflict management processes.

## **PART ONE: INSTITUTIONAL DESIGN — RECOGNIZING, CREATING AND FORMULATING CIVIL DISPUTES**

### **7. TURNING INTERPERSONAL AND SOCIAL CONFLICTS INTO CIVIL DISPUTES**

Any meaningful discussion about the optimal configuration of processes and institutions for resolving civil disputes cannot proceed on the basis that the current regime of dispute settlement is written in stone. After all, existing structures of civil disputing are not the result of a team of experts having rationally planned a comprehensive system. The present arrangement of what disputes are channelled to courts and what disputes are not is a product of momentary coalitions of interest groups at different times, the present balance of political forces, beliefs about the requirements of justice, and the economics of managing a regime of civil disputing. These same factors equally influence what conduct the law explicitly seeks to regulate and what it leaves implicitly regulated. After all, the institutions and procedures for resolving civil disputes are only a part (and the final part at that) of the civil justice system. The reform or recasting of the system of civil disputing therefore demands a prior clarification of the various processes and institutions for creating or recognizing civil disputes, and for giving them a specific legal formulation.

This exercise in clarification has two distinct components. In a first section of this Part, the role of law and legal institutions in creating civil disputes will be considered. Attention initially will be given to how legal recognition transforms conflict and the variety of different ways in which civil disputes can be structured. The section then examines legislation and adjudication as complementary official processes for creating civil disputes. It concludes with an excursus on legislative technique. What impact might different approaches to legislative technique have on the rate and nature of civil litigation? Are there any inherent limitations on the kinds of social tasks that can be accomplished by civil litigation?

The second section of Part One considers the judicial process in greater detail. It begins by reviewing the forms and limits of adjudication as an institutional process, prior to assessing whether only courts should undertake adjudication and whether courts should undertake only adjudication. The nature of judicial remedies and the role of court judgments in creating law are then examined with a view to evaluating whether modifications to these aspects of the judicial process could improve the efficiency of the civil justice system. This second section concludes with a brief consideration of the role of the legal profession in encouraging or minimizing civil litigation.

Before these several themes are addressed, however, three caveats need to be entered. To begin, this Part of the Study focuses on disputing as one particular



feature of human interaction. It is not suggested that the problem of recognizing, creating and formulating civil disputes exhausts the ways in which law should be examined.<sup>31</sup> But the perspective of conflict and the resolution of conflict is that assigned to the Civil Justice Review as an organizing framework. The conception of law as constituting non-conflictual interpersonal and social relationships—that is, as providing general baselines to guide human interaction—will, however, be at least implicitly explored. It is, of course, acknowledged that the choice of metaphor—whether social control, social engineering, facilitating human interaction, coordinating behaviour, disposing of trouble cases, maximizing wealth or enhancing social solidarity—will have a major bearing on the relative priority one attributes to different legislative strategies. The Conclusion to this Study considers how these alternative ways of conceiving the relationship between law and human interaction bear on understandings and assessments of the civil justice system. Nevertheless, the main text itself operates within the conflict resolution model.

In addition, it should be noted that this Part is directed primarily to individual conflict and disagreement giving rise to civil disputes. Yet individual disputes are not just the product of the relationship between two people: they also have a social dimension. An apparently simple disagreement between a seller and a purchaser about a defective consumer product implies a whole series of social relationships flowing from, among other things, the assumptions of a market economy, the dynamics of mass consumption, the specialization of function between financiers, manufacturers and retailers, and the relative cost of labour and materials. Social conflicts in this sense are not simply aggregated individual disputes.

Yet our constitutional system allocates, at least in principle and subject to litigation under the *Canadian Charter of Rights and Freedoms*, decisions that explicitly address social disputes in the former sense to the political process. For this reason, and given the overall object of the Civil Justice Review, the point of entry for considering the ways in which the law recognizes, creates and formulates legal disputes will be disagreement and conflict between individuals. This is not to say, it bears repeating, that decisions about the treatment of what look like nothing more than individual disputes, have no social implications. Recognizing the possibility of a tort action for spousal assault implies a major re-orientation in the social construction of marriage. Again, the Conclusion will address how the present institutions and processes of civil disputing in Ontario predispose us to not seeing the social dimension of legally acknowledged disagreement and conflict between individuals.

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<sup>31</sup> Compare S. Silbey and S.E. Merry, "What do Plaintiffs Want? Reexamining the Concept of Dispute" (1984) 9 *Justice System Journal* 15; R. Lempert, "Grievances and Legitimacy: The Beginnings and End of Dispute Settlement" (1980-81) 15 *Law and Society Review* 707.



Finally, it is important to acknowledge how the origin of this Study in a publicly-funded Civil Justice Review controls its overall intellectual framework. That is to say, certain topics such as the question whether increased legislative precision or more detailed statutory definitions might reduce litigation, or whether stricter adherence to the principle of *stare decisis* might reduce litigation by facilitating settlements, are considered here not because they are central to the exercise of determining the conditions under which a re-allocation of civil disputes might make the justice system more efficient, more expeditious and more accessible, but rather because they were explicitly assigned to the Fundamental Issues Group for investigation.

## SECTION A. THE RECOGNITION AND CREATION OF CIVIL DISPUTES

### 8. THE TRANSFORMATIVE EFFECT OF LEGAL RECOGNITION

However natural it may seem to be that the law considers a particular type of human interaction as legally cognizable—for example, however natural it may seem that a landlord who fails to maintain an apartment in a decent state of repair should be liable to compensate tenants for the inconvenience they suffer—this legal acknowledgement is not preordained by anything inherent in that interaction. The complexity of the processes by which this “natural” result is achieved rarely is explored in relation to civil (as opposed to criminal) justice. Many studies have examined how the criminal law defines and transforms interpersonal and social relations. An entire academic discipline—criminology—takes this to be one of its central concerns. But the equally powerful transformations flowing from the decision to deploy the civil law as a vehicle of legal recognition have received much less attention.<sup>32</sup> Two of these transformations are noted here, albeit initially within an intentionally narrowed understanding of civil disputes that excludes regulatory and administrative law. The transformative effect of recognition through administrative processes is considered immediately thereafter.

A first transformation occurs because the decision by the legislature or the courts that a certain type of human interaction merits legal recognition has a profound symbolic effect. Prior to this recognition by the law, there can, strictly speaking, be no civil disputes. A relationship may exist, but a legal relationship,

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<sup>32</sup> Compare, however, W. Felstiner, R. Abel and A. Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming and Claiming ...” (1981) 15 *Law and Society Review* 631; L. Mather and B. Yngvessen, “Language, Audience and the Transformation of Disputes” (1981) 15 *Law and Society Review* 775. See also A. Sarat, “The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions” (1985) 37 *Rutgers Law Review* 319.

whether or not giving rise to a civil dispute, does not. After this recognition, there seem to be nothing but legal relationships and civil disputes. Legal recognition opens the door to a possible lawsuit by providing a specific characterization of the occasions when a court action will lie and by providing an institutionalized forum within which the conflict may be debated; it also deeply affects the way in which people thereafter understand the type of interaction in issue, and changes the way in which citizens talk about everyday conflict.

Legal recognition is a form of social power. After legal recognition, it is difficult for people who do not wish to see their social and interpersonal relationships cast as civil disputes to resist this characterization by those with whom they have a disagreement. The threat of law's invocation serves as a bargaining chip even in the most informal settings where conflict is present. A disagreement about the location of a back-yard fence that has turned into a civil dispute about property rights is often difficult to settle without an escalation of legal polemics, even in cases where one party wishes to do so. A well-informed consumer is not reticent to describe a complaint in the language of a "right" to obtain a replacement consumer durable, or to threaten a merchant with a lawsuit over a product defect. Concomitantly, the well-informed seller faced with such a claim will know exactly what the legal limits of the product warranty are, and will be more inclined to stand on her or his rights as against an aggressive consumer. No longer is the purchaser-seller nexus argued only in terms of reciprocity—of the maintenance of the relationship and the mutual adjustment of inconvenience; it is also a legal contract under which one or the other party has a winning argument.

The further transformative dimension to how the law creates civil disputes concerns the manner by which the claims and entitlements of potential litigants are set out. The precise definition of any legal entitlement is not determined simply because the legislature or the courts concludes that a legal solution to a social or interpersonal conflict is necessary or desirable. There is no automatic criterion for deciding whether a civil dispute should be formulated, to take one example, as a no-fault claim against an automobile accident insurance fund or as a civil claim against an allegedly negligent driver. Similarly, whether a civil dispute should be formulated as a claim for a "fair share" of family property, or as a claim for a fixed percentage of an ex-spouse's assets, or should be organized by declaring ex-spouses "joint owners" of certain assets is ultimately a policy decision. These decisions are, of course, constrained both by political considerations and by reasons of administration, enforceability and equity, but none are simply given by the nature of the conflict in question.

It follows that the decision to give legal recognition to a particular kind of disagreement not only transforms that disagreement into a civil dispute, it actually creates a new dispute. A series of examples drawn from the field of

family property law will show the various dimensions through which law creates these new disputes. (i) The law describes the limits of the conflict: for example, today formally married couples may be given extensive property entitlements upon marriage breakdown, while other cohabiting couples in almost identical circumstances may be denied such entitlements. (ii) The law determines what factual aspects of the conflict are legally relevant: for example, today one spouse may be entitled to claim property despite having abandoned the other, but may not be entitled to make a claim for additional property to compensate for having suffered physical abuse over a lengthy period. (iii) The law elaborates a series of rules and principles that are deemed exclusively to govern the outcome of the conflict: for example, today one spouse may be entitled to claim a share of the other spouse's pension entitlements as a reflection of deferred income, but not a share of the value of, say, a license to practice medicine considered as a capital asset. (iv) The law establishes a range of remedies thought appropriate for dealing with the conflict: for example, today one spouse may be authorized to obtain possession of the matrimonial home, but be denied the right to continue to use an ex-spouse's surname.

All of the above decisions of legislative policy serve to define legal relationships and to create precise civil disputes. In doing so, they have three consequences. First, they marginalize by ricochet those social and interpersonal conflicts of a similar nature that do not fall squarely within the newly defined legal relationship. Current debates about the property entitlements of same-sex couples at the end of a long-term relationship illustrate the transformative effect of legal recognition, especially in cases falling just outside the existing or newly-established legal regime. Whatever one's views of the merits of such recognition, the development of an explicit regime of "family property" rather than a general framework of what the civil law calls "quasi-contract", has, in combination with a political agenda that views recognition of status as an objective equally important as material compensation, led to pressure on the meaning of the terms "spouse", "marriage" and "family", rather than on the meaning of the term "unjustified enrichment".

In addition, the civil dispute that has been created may constitute only an incomplete response to the underlying social or interpersonal conflict, even in those cases that the law intends to regulate. For example, the failure explicitly to recognize intellectual capital as a matrimonial asset of the same character as a family farm constitutes for many couples an undue narrowing of their underlying conflict.

A third transformation is that reflected in the distinction between the "effectiveness" and the "efficacy" of legal regulation. To develop a legal regime that creates legal disputes that may be effectively resolved in the desired manner does not mean that the underlying social problem has been solved. Providing for automatic administrative deductions of support payments from a weekly wage



payable by an employer may be 100% effective in ensuring garnishment. If it results in the transformation of wage labour into a widespread barter economy at the company store, 100% effectiveness may result in a significantly smaller co-efficient of efficacy.

Except in those rare civil disputes where disputants are required to bring their conflict to court—for example, in the case of a divorce or a child custody argument—how well the law captures the substantive justice of the disagreement between potential litigants is one factor that will have an important bearing on the work-load of courts and other dispute resolution institutions. The more that legal entitlement and moral right coincide, the less it is likely that litigation will be pursued for strategic advantage. Of course, this is not to say that a well thought-out regime of civil law will eliminate recourse to litigation, for disputants may well have tactical reasons for going to court, even when they know that they will lose. But it does point to the impact that the scope and scale of legal acknowledgement of patterns of social and interpersonal interaction can have on the rate and nature of civil litigation.

## 9. THE INEVITABILITY AND VARIETY OF CIVIL DISPUTES

A number of popular commentators lament what they see as an increasing, and unnecessary, legalization of society. They believe either that the civil law will be incompatible with ordinary patterns of human interaction, and therefore inappropriate, or that it will be compatible, in which case it is unnecessary and can be dispensed with. Typically, those who take this view also suggest that “the litigation explosion” and “the judicialization of everyday life” are the inevitable consequence of a prior pathology—the rampant overuse of law to solve social problems.<sup>33</sup> These are dubious affirmations. No one who has observed human behaviour with any detachment would claim that law is unnecessary because people can live together harmoniously and without conflict. In complex, mobile, polyethnic societies with market economies the social construction of race, gender and class leads to social conflict that itself can find reflection in civil litigation. Of course, the democratic political process is believed, at least in some measure, to permit the peaceful negotiation of these social conflicts.

Whether this is so, the occasions for, and types of, everyday human interaction in modern societies are also numerous and diverse. Some of these interactions constitute conduct that does not conform to the standards that the relevant community or society as a whole espouses. Some also lead to relatively individualized disagreement and conflict. Many social theorists believe that a

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<sup>33</sup> For a thoughtful critique of this anti-legal ideology, see Y.-M. Morissette, “(Dé)judiciarisation, (dé)juridicisation, et accès à la justice” (1991) 51 *Revue du Barreau* 585.



measure of interpersonal disagreement and conflict is necessary to a healthy, vibrant and open civil society. One might wish to think that the optimal means for structuring human interaction is to suppress or diffuse conflict, and that the decision to characterise any disagreement between two or more people as a civil dispute is always an admission of defeat.

The evidence is otherwise. Law can serve to modify the balance of social power precisely because it permits injustices and conflict to be openly expressed. In other words, the recognition and creation of a civil dispute from a social or interpersonal conflict can, depending on the manner of the recognition, be as effective in promoting social peace as the criminalization of murder was in standing surrogate for private retribution and blood-feuds. The creation of civil disputes is, on this analysis, an important process by which a society stabilizes its institutional arrangements. Whether legalisation—in general, or in any particular case—is a social pathology cannot be determined by abstract formula, popular slogans or ideology.<sup>34</sup> Whether the Parliament of Ontario should accord legal recognition to any given pattern of human interaction, and whether it should do so through the creation of a civil dispute are fundamentally exercises of political judgment.<sup>35</sup>

In the immediately preceding paragraphs, the concept of a civil dispute has been given a quite limited meaning: a civil dispute flows from the legal recognition by means of rules of duty and entitlement of a social or interpersonal conflict between private citizens. But not all civil disputing, in a larger sense, is of this kind. Sometimes it involves conflict between citizens and corporations or a conflict among corporations. Sometimes it involves conflict between citizens or corporations and the government. Even when Parliament decides to do something about an interpersonal or social conflict, it is not thereby automatically compelled to turn to the civil law in the narrow sense to find a solution.

The creation of administrative agencies to regulate large chunks of social life that previously were assigned to the Common law and the courts—for example, aspects of workers compensation, labour standards, automobile accident compensation, landlord and tenant, consumer protection, land-use regulation, and so on—reflect legislative decisions about the optimal way of configuring human interaction and conflict by law. These agencies sometimes simply permit citizens

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<sup>34</sup> See M. Galanter, "Legalisation and Its Discontents" (unpublished manuscript dated April 27, 1990), published in a revised version as "Law Abounding: Legalisation Around the North Atlantic" (1992) 55 *Modern Law Review* 1.

<sup>35</sup> I have tried to trace out some of the factors driving the exercise of political judgment, and some of the consequences for the law which flow therefrom in R.A. Macdonald, "Images du Notariat et Imagination du Notaire" (1994) 1 *Cours de perfectionnement du Notariat* 1.

to carry on ordinary civil disputes in a different forum. For example, the authority of an inspector acting under the *Line Fences Act* to determine the location and character of a boundary fence between neighbours involves the recognition of a civil dispute that will be decided otherwise than by a court. Or, a certification hearing under the *Labour Relations Act*, or an adjudication of a claim for damages for discrimination under a *Human Rights Code* are both administrative processes designed to resolve civil disputes. While most often these administrative hearings stand surrogate for a judicial action, and can be seen as everyday processes of civil dispute resolution, on occasion they change the nature of the civil dispute itself, so that the conflict is recast, in at least one of its facets, as a dispute between citizens and the government.

Conflicts between citizen and government are of many types. Most obviously, they can involve ordinary tort or contract disputes—claims for injuries sustained in a motor vehicle accident involving a government vehicle, or in connection with the failure of the government to pay for products supplied and delivered. But civil disputes with the government may also arise whenever an administrative agency created to replace courts in the allocation of tort and contract remedies between ordinary citizens becomes one of the parties. This can occur if a citizen disagrees with the decision of an official charged with determining the respective entitlements of two or more parties (a certification decision of a labour relations board, for example), or with the decision of an official charged with determining an individual entitlement (a decision to refuse a building permit, or a decision not to pay an O.H.I.P. claim, for example). The former are classical judicial review problems, and not civil disputes even in the wider sense intended here. Only because our constitutional system permits courts to review decisions of administrative tribunals notwithstanding that the statute giving authority to the decisionmaker denies parties a right to appeal, is the disagreement transformed from a conflict between two private parties (say, the employer and the union) into a challenge to the decisionmaker.

Disputes where an administrative or governmental official denies an entitlement, however, are more closely analogous to civil disputes between citizens. In these cases, there is no social or interpersonal conflict (let alone legal dispute) between citizen and government prior to the institution of the regulatory or entitlement regime. To take the example of building permits, unless all forms of construction were to have been previously prohibited, absent a regulatory requirement to obtain a permit one would simply commence building. The above example is not meant to suggest that there will never be any social or interpersonal conflicts arising because a person decides to develop a piece of real estate. Close neighbours may well be displeased. Those more distant may be concerned about the impact of the construction on sewer services, schools, fire protection and tax rates. But, perhaps more than in ordinary cases of civil disputes between citizens, the transformative effect of legal recognition in

regulatory or entitlement regimes is apparent. If the conflict is seen to be only between citizen and government, there is, in fact, no conflict absent legal recognition of a civil dispute. Conversely, if the conflict is seen to be, for example, really between neighbours, the newly created civil dispute between citizen and government operates fundamentally as a replacement for a civil dispute between ordinary citizens.

These above observations can be generalized into a discussion of the nature and form of law by which civil disputes are created. Is it certain that processes ultimately requiring recourse to lawyers and official dispute resolution institutions—be they courts or administrative agencies, are always the best way of understanding interpersonal and social conflicts? Might not, for example, processes requiring recourse to social workers and psychiatrists, or teachers and community mediators be preferable in certain cases? In a Civil Justice Review, should one not, in fact, be asking at the outset about alternative “dispute creation” rather than alternative “dispute resolution”? To put the issue slightly differently, there is no compelling reason why the political decision to give public acknowledgement to any particular category of social or interpersonal interaction must be reflected in the creation of any kind of legal dispute. And there is, moreover, no compelling reason why the political decision to give legal recognition to a given category of social or interpersonal conflict must, thereafter, be reflected in the creation of a civil dispute, however narrowly or broadly understood.

## 10. LEGISLATION AND ADJUDICATION AS ALTERNATIVE MEANS FOR CREATING CIVIL DISPUTES

In a jurisdiction such as Ontario that follows the English Common law tradition, a significant amount of the law giving rise to civil disputes has never been enacted by the legislature, but is derived from decisions of the courts. Of course, constitutional principles require that what is formally characterized as the criminal law be announced in statutory form—*nulla poena sine lege*. Similarly, the Diceyan concept of the Rule of Law requires that the exercise of governmental authority—such as that assigned to an administrative agency—be justified by statute or statutory derivative, apart from those rare cases where the Crown prerogative may still be called in aid. Furthermore, the Supreme Court of Canada has held that federal private law, for example, in respect of marriage, divorce, banking and bankruptcy, must also be generated legislatively. There is, that is, no unenacted federal common law.

But there is no such requirement for legislation in respect of non-federal private law, that is, in respect of legal rules relating to what the *Constitution Act, 1867* calls “property and civil rights”. In Ontario, therefore, provincial law



governing legal relationships that might ultimately find expression in a civil dispute may be formulated in either statutory or Common law form. The political decision to recognize these disputes may be taken either by the legislature or, in the guise of “discovering the true rule of the common law”, by the courts.

Over the past two hundred years a number of changes to the form and substance of this law of civil disputes have occurred. The number and nature of dispute settlement institutions is in constant evolution, and the underlying logic of legal regulation is also mutating. Leading up to the *Judicature Acts* of the 19th century Parliament began to consolidate different judicial institutions. Ultimately, the jurisdiction of courts of Common Pleas, King’s (or Queen’s) Bench, Chancery, Admiralty, Probate, and ecclesiastical courts was integrated. At the same time, the substantive rules of law they administered were notionally “fused” into a single system. The tendency to consolidate courts has continued to the present day with the recent creation of the Ontario Court (General Division) and the abolition of County and District Courts. But at the same time that judicial institutions were being amalgamated, a number of administrative tribunals with specialized decisionmaking authority were being established. Even though the official rhetoric of legislative change has been that of the amalgamation of **courts**, and the creation of **tribunals** (that is, decisionmaking bodies other than courts), the institutions for resolving disputes in Ontario have remained as pluralistic as in previous centuries.<sup>36</sup> The impact of this re-ordering on the rate and nature of civil disputing will be considered more fully in the second Part of this Study Paper. For the moment, the concern is to evaluate the effect that a changing relative balance between statutes and the Common law has had on civil disputing.

All commentators acknowledge that weight of statutory civil law has progressively increased during the 20th century. This legislative endeavour has generated three main types of statute. Some statutes have a very narrow compass and are intended simply to overrule specific doctrines of the Common law. Others seek to re-order larger parts of the Common law, and often establish regimes of legal regulation in fields previously untouched by Common law rules. Still others seek to reform the Common law by creating new regulatory regimes managed by administrative tribunals. In the latter two cases especially, the impact of legislation on civil disputing has been profound.

A significant amount of what was previously unwritten Common law has been the subject of detailed legislative re-ordering, even though ordinary courts

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<sup>36</sup> A full account of the diversity of legal regimes and decisionmaking institutions in 19th century England is provided by H.W. Arthurs, *Without the Law* (Toronto: University of Toronto Press, 1985). There is no reason to assume that a similar diversity did not exist at the same time in Ontario.



retain dispute resolution jurisdiction over the field: in Ontario, family law, successions, consumer law, sale of goods, insurance and personal property security are the most salient examples. For reasons known all too well, when legislatures adopt these generalized statutes they usually do so under pressure to reform the substance and not just the form of the law. In fact, it is difficult to think of a modern example of legislative reordering that was only intended to or only had the effect of consolidation, clarification or rationalization. Even the reform of personal property security—usually cited as an example of a functional rationalization motivated by concerns essentially related to minimizing transaction costs—has had substantial distributional effects.

With only a few exceptions the basic pattern of the Common law was transactional, and its underlying logic was that of corrective justice. The law sought to maintain justice in transactions without much concern for the justice of the relative entitlements of parties prior to the transaction in question. By contrast, statutory law reform has usually involved the legislatures acting to shift the values of the law, and to change the relative balance of power or advantage from one class or group of person to another. In so doing, this sometimes, but not always, means that they incorporate some principle of distributive justice into the basic framework of the Common law being reformed.

Reform of the civil law is normally accomplished by one of two techniques: either the legislature recognizes a new form of property, thereby changing the existing distribution of entitlements; or it changes the scope of contractual bargaining, thereby changing the existing distribution of judicial remedies. In the former case, while courts maintain jurisdiction to decide disputes, the law they apply is no longer grounded exclusively in the assumptions of corrective justice as these were previously understood. Much civil litigation is initially undertaken to determine the true scope of the *ex ante* legislative reordering of entitlements. In the latter case, the legislative reordering of entitlements occurs by means of an *ex post facto* authority given to courts to modify contractual arrangements, or principles governing the attribution of liability in tort. When damages rules are designed to facilitate recovery from deep-pocket defendants regardless of their degree of fault, it is apparent that redistributive assumptions are being interwoven into the basic structure of private law. Today this is notably the case in respect of the law of torts, family property regimes, dependent's relief legislation, consumer law, and non-consensual liens upon personal and real property.

The explicit *ex ante* redistribution of property entitlements, or the explicit *ex post facto* incorporation of redistributive assumptions into processes of dispute-settlement is also a central feature of many legislative reforms that create administrative agencies. In other words, what is characteristic of much modern administrative law is not just that separate non-judicial dispute-settlement tribunals have been created. It is, rather, that these tribunals are explicitly given

an allocative or redistributive mandate which is intended to palliate inadequacies of the justice administered by the courts applying rules of the Common law. Again, this may occur by assigning a new property right or by imposing mandatory terms in certain interpersonal relationships.

What is more important for a consideration of the character of civil disputing, in pursuing their mandate, these tribunals are authorized to adopt decisionmaking procedures different from those followed by courts. For example, lawsuits between employees and employers for injuries caused in the workplace have been replaced by workers compensation schemes in which providing recovery for injuries suffered, rather than shifting the burden of the loss on the basis of blame is the primary goal. A similar result is achieved through no-fault schemes of automobile accident compensation, where compensation is grounded in consciously chosen redistributive or loss-spreading goals rather than in individual liability for a loss wrongfully caused to another.

Reform of the Common law in order to enlarge the scope of legally protected interests or to promote redistributive goals has not been exclusively the affair of the legislature. The courts themselves have often contributed to the endeavour—either by adjusting the regime of civil obligations (tort and contract), or by announcing new property rights. A striking example of Common law reform explicitly directed to advancing redistributive goals is the development of the doctrine of market share liability. Permitting plaintiffs to recover damages in tort without actually having to prove a causal link to a specific defendant is the Common law analogue of no-fault accident compensation regimes.<sup>37</sup> Similarly, the recent discovery of a pre-contractual duty of disclosure and of a duty to give reasonable notice before realizing upon a security interest can be seen as attempts by courts to incorporate principles of distributive justice into the ordinary contractual regime. And again, the judicial development of doctrines such as the “equity of redemption” in mortgages or the “constructive trust” in non-contractual relationships reflect decisions by courts to create new property rights.

The basic point of the preceding paragraphs is simply that the contemporary restructuring of the private law of civil disputes has significant implications for the nature and volume of litigation. Social policies which can only be described by more abstract formulae such as equity, fair, just, and reasonable—however laudable—do not easily lend themselves to adversarial adjudication. As much as one might wish civil disputes over the meaning of these formula to be decided by the courts (and especially by judges), they pose difficult challenges for the ordinary judicial process. Moreover, the more the regime of civil law requires

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<sup>37</sup> For elaboration of the point, see R. Baruch-Bush, “Between Two Worlds: the Shift From Individual to Group Responsibility in the Law of Causation of Injury” (1986) 33 *UCLA Law Review* 1473.

decisions based on the substantive characteristics of particular disputes (the more the regime resembles what Max Weber characterized as a substantively rational scheme of adjudication), the harder it is for other litigants to predict future judgments, and the less successful a regime of precedent will be in shaping litigation.

The above observations are not, it should be emphasized, a plea for a return to a private law where property entitlements are clearly fixed in advance and where the law of obligations responds only to a logic of corrective justice. They should not be understood, that is, as a claim that the legislature and the courts should be precluded from attempting to overcome injustices caused by a rigorous application of the logic of corrective justice to civil disputes. Nor is it to claim that courts should not decide disputes that involve issues of distributive justice. It is to note, rather, that traditional understandings of how law functions, and the relationship of legal rules to the process of adjudication no longer capture the reality of much modern civil law. It is also to highlight the centrality of administrative agencies performing both adjudicative and non-adjudicative functions to the civil dispute resolution process.

Whether it was ever the case that the universe of civil justice could be meaningfully apprehended only by reference to the disputes brought before the Common law courts, in the late 20th century non-judicial agencies and tribunals are also recognizing and creating a panoply of new civil disputes in their administration of their governing statutes.<sup>38</sup> Legislatures, courts and agencies are all central players in the creation of civil disputes.

## 11. LEGISLATION, LEGALIZATION AND LEGALISM

Today, constitutional theory and democratic political ideas combine to make legislation a preferred vehicle for creating civil disputes. Not surprisingly, therefore, legislation and the legislative process carries the burden of most critiques of law.<sup>39</sup> One such critique—the overuse of legislation to solve social problems—has already been adverted to. But apart from the complaint that too much law destroys civil society, there is another critique of legislation that has

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<sup>38</sup> This aspect of administrative law, what might be called the “common law of the agency”, is often neglected in assessments of civil disputing. For a discussion, see R.A. Macdonald, “On the Administration of Statutes” (1987) 12 *Queen’s Law Journal* 488.

<sup>39</sup> Of course, in the United States a further target of critical comment is the so-called litigation explosion. See, for example, D. Hensler, *et al.*, *Compensation for Accidental Injuries in the United States* (Santa Monica: Institute for Civil Justice, 1991), and H. Kritzer, W. Bogart and N. Vidmar, “The Aftermath of Injury: Compensation Seeking in Canada and the United States” (1992) 25 *Law and Society Review* 499.



an overtly political agenda. Some commentators believe that law has no role in the marketplace, and that strategies such as de-regulation, privatisation and de-legalization are necessary to return the civil law to its true roots. Legalisation in this sense is, however, not necessarily viewed by the general public as an evil. Far from it. The use of legal forms and legal institutions to “correct” imbalances in market or social power is seen as a central task of the democratic political process.

When ordinary citizens decry legalisation what they usually are objecting to is an attitude about how law ought to work that they ascribe to lawyers—the attitude reflected in admonitions like “stop being legalistic.” Lawyers seem more concerned with form than substance—with letter than spirit; and lawyers seem more concerned with pathologies, exceptions and limits than with making the system work. Of course, many citizens have a legalistic urge as well—especially when it is in their interest. But they are neither as sophisticated at the endeavour as lawyers, nor as unstintingly committed to its practice. To understand why the lawyerly addiction to “being legalistic” is found offensive by many citizens it is helpful to begin by considering the notion—legalism—of which it is a professional perversion.<sup>40</sup>

Legalism is an ethical position holding that justice results from enacting precise rules establishing rights and obligations, and then strictly following the rules laid down.<sup>41</sup> At its most noble, legalism describes the attitude that prevents jurists from ignoring or subverting democratically enacted legal rules on the basis that in the particular case confronting them it would be better to do so for subjective reasons dressed up in the language of “equity” or “public policy”. Legalism is the notion that lies at the heart of familiar notions like “the Rule of Law, not the Rule of Man” or “judicial objectivity”. At its worst, by contrast, legalism permits decisionmakers to refuse to ever consider the legitimacy or the justice of the rules they apply. Legalism grounds the defence of those who commit atrocities that they were only following orders.

One can understand and appreciate that a commitment to legalism is an essential feature of the legislative and judicial processes in the Common law. Yet, the Common law system is also based on the notion that judges exercise judgment, and are permitted to overcome the constraints of unjust law (or the unjust application of the law) where required. Finding the optimal balancing of legalism and judicial discretion in adjudication, and avoiding servility to one or

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<sup>40</sup> For a careful assessment of the causes of this anti-legal sentiment, see M. Galanter, “Law Abounding: Legalisation Around the North Atlantic” (1992) 55 *Modern Law Review* 1.

<sup>41</sup> The term was coined and the definition first offered by Judith Shklar in *Legalism* (Cambridge: Harvard University Press, 1964).



the other (being legalistic or being arbitrary and capricious) is what defines civil justice.

The notion of legalism does, however it is understood, put a premium on the existence of rules. This leads to the speculation that Parliament should seek to maximize the number of written rules by which rights are attributed to citizens. In other words, legalism would seem to argue for as many social and interpersonal relationships as possible being recast in terms of rights and duties.<sup>42</sup> And once a problem or conflict is structured as a rights claim, it is difficult to resist the conclusion that third-party dispute settlement is required in order to validate or invalidate the claim in any concrete case. One might then legitimately ask whether the root cause of what some perceive as overcrowding of courts is an excessive attachment to legalism as an ideology of democratic politics. Is it really necessary that the formal-rationality of modern civil law find its expression only in explicit legislation?<sup>43</sup>

While this is not the occasion to address these questions of political and legal theory, there is a utility in asking whether there are other ways of thinking about the way human relationships may be characterized by the civil law. Normally, given contemporary democratic electoral politics, the two distinct steps by which ordinary civil disputes are created—the legislative conclusion that a particular act or activity has a legal dimension, and the decision to give expression to this dimension through civil law rules of duty and entitlement—are collapsed in the legislative process: the possible is automatically seen as the desirable. Our current presumption is that all human events are potentially cognizable by legislatively enacted law, and that with enough time and money all aspects of everyday life can be brought under the governance of official legal rules administered by courts. But as jurists in North America came to appreciate

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<sup>42</sup> A thoughtful exploration of this question may be found in Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991).

<sup>43</sup> For a discussion of the alternatives that goes well beyond the scope of this study, see R.A. Macdonald, "Pour la reconnaissance d'une normativité implicite et inférentielle" (1985), 18 *Sociologie et Sociétés* 48, and the trilogy by M. Reisman, "Looking, Staring and Glaring: Microlegal Systems and Public Order" (1983), 12 *Denver Journal of International Law and Policy* 165; "Lining Up: The Microlegal System of Queues" (1985), 54 *University of Cincinnati Law Review* 417; "Rapping and Talking to the Boss: The Microlegal System of Two People Talking" in *Conflict and Integration: Comparative Law in the World Today* (Chuo University, Institute of Comparative Law in Japan, 1988).

after the turn of the century, some conduct appears to be beyond the reach of effective legal action through the civil law as traditionally understood.<sup>44</sup>

On occasion, the civil law does not take hold in a particular situation because the normative pre-conditions for legal regulation through rules of duty and entitlement are absent. A regime of fault-based liability for resolving conflicts arising from automobile accidents involving hundreds of vehicles is bound to fail; the central concepts of damage apportionment, causation and reasonable care presuppose the capacity of drivers to adjust their conduct according to a standard of due care, an unrealistic presupposition in these cases. What is more, a legal rule that treats causation as a time-limited discrete occurrence requires the almost impossible evidentiary task of disentangling the actual circumstances confronting, and actual reactions of, individual drivers. Again, to subject parental decisions about the appropriate portions of dessert for each of their children to the constitutional norms of due process and equal protection, is an equally futile enterprise; a parent simply does not have the capacity to organize day-to-day household events according to a decisionmaking model developed for the allocation of legislative benefit and burden.

There is another limitation on effective regulation by the civil law—a managerial constraint. Take the case of an argument during which people hurl derogatory epithets at each other. The question is whether this particular conflict can be efficiently recast as giving rise to a civil action sanctioning the tort of defamation. This type of cost/benefit analysis will generally proceed by considering the following types of question: is the factual basis necessary to prove a defamation simple or multifaceted? can the evaluation of damage be more than a guestimate? is the remedy of damages an adequate reparation? is the cost of litigation disproportionate to the expected recovery? are the motives of the plaintiff to “teach a lesson” or to “get even” or are they to “receive monetary compensation for real loss” or to “get justice”?

Whether the creation of a civil dispute is the optimal way of handling any given conflict, assuming one wants to achieve effective regulation rather than just the pretence of legal regulation, very much depends on the answers given to these questions. But this example highlights a further complication. Any given interpersonal conflict is at the same time the reflection of a social conflict. Independently of the individual interest being protected by an action in defamation, the State may be interested in protecting “free speech”; or there may be a social interest in protecting reputation as a capital asset; or a particular community may have a special interest in pre-empting certain forms of hate

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<sup>44</sup> See, for example, R. Pound, “The Limits of Effective Legal Action” (1917) 3 *American Bar Association Journal* 55, and L. Fuller, “The Law’s Precarious Hold on Life” (1969) 3 *Georgia Law Review* 656.

speech. The quest for optimal legal mechanisms for handling disputes once these other elements or interpersonal conflicts are acknowledged significantly complicates cost/benefit analysis in the realm of civil disputing.

These various aspects of the decision to create legal disputes are not frequently addressed in studies of civil justice. Often, it is simply taken for granted that legislatures are acting wisely when they define a particular slice of social life as being legally cognizable. Over the vast range of circumstances, there is a plausible argument that this has been true.<sup>45</sup> Moreover, and especially in the case of the civil law, the democratic legislative process is such that most citizens appear to be inclined to accept the legitimacy of the law so enacted, or at least to accept the law as a “given”. Even when particular civil law rules are contested, for the most part this contestation is channelled through the law reform process: the solution to bad legislative choices is invariably thought to be more (and, it is hoped, better), not less, law.

Experience does, nevertheless, suggest both structural and substantive limitations to effective legal regulation by means of the civil law administered by courts. The standard arguments for the creation of administrative agencies—efficiency, expertise, functional integration, policy development, proactive authority, responsiveness to technological change, accessibility, output rather than process—track most of these structural limits.<sup>46</sup> But in part because the civil law administered by courts is reactive, and depends on plaintiffs to put its facilities into motion, it usually presupposes a capacity for, and the exercise of, rational calculation by potential litigants. That is, the civil law works best in the middle range of human interaction between the extremes of overt hostility and intense affect; in particular, the civil law has shown itself to be an efficient mode of social ordering in the realm of friendly (or at least not unfriendly) non-intimates—of competitive markets and of incidental and chance misadventure.

Once the level of affect reaches an intense level, there is often more at stake in interpersonal conflict than merely solving a particular disagreement—getting even becomes as important as getting justice according to the rules laid down. Disputes over the division of an estate, or over the allocation of family assets upon divorce, are often surrogates for other grievances. Trying to use a rule

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<sup>45</sup> I leave aside, as beyond the scope of this Study, whether from a broader perspective the project of using legislated rules of duty and entitlement to achieve social justice is a flawed endeavour. For one moderately empirical speculation of this type, see D. Black, *Sociological Justice* (Toronto: Oxford University Press, 1991).

<sup>46</sup> For two detailed discussions see “Symposium: The Legacy of the New Deal: Problems and Possibilities in the Administrative State” (1983) 92 *Yale Law Journal* 1083-1356, and “Special Issue on Administrative Law” (1990) 40 *University of Toronto Law Journal* 305-686.



about the validity of a testamentary disposition to resolve a dispute having its origin in the perception that “mom and dad always liked you best” is not an easy task. Similarly, if the level of hostility is so great that enforcement is likely to be ineffective, or a judgment is likely to be followed by a retributive act, legalism and rights again reach their limits. Disputes involving a debtor who is more willing to face bankruptcy or even contempt proceedings than to execute voluntarily a judgment obtained by a creditor who is despised because of a business partnership gone sour are, once again, not easily resolved by judicial process.

Many of the most pressing problems of civil justice flow from the attempt to use the civil law and the civil dispute system to solve interpersonal and social conflict where its assumptions are inapt and its forms and processes are inept. Once again, this is not to say that the law should withdraw from these areas of conflict. Nor is it to say that there should be no non-criminal recourse. Nor is it even to say that an ordinary rights-and-entitlement based lawsuit before the civil courts should be eschewed. An imperfect civil solution is preferable to violence or flagrant injustice; and sometimes the public value of judicial adjudication of a dispute will outweigh structural sub-optimality. But, if an underlying concern is whether there are alternatives to courts as a mechanism for resolving civil disputes, and if civil disputes are largely the construction of the legislature and courts, then a fundamental question ought to be whether there are alternatives to the granting of a justiciable right—that is, a right that can be vindicated before the courts—as a way of giving legal recognition to social and interpersonal conflict.

## **12. THE RELATIONSHIP BETWEEN PRECISION IN LEGISLATIVE RULES AND RATES OF LITIGATION**

The previous paragraphs suggest that an important determinant of rates of civil litigation is the amount and character of law that exists within a given society. The more human relationships are given an expression in rules of duty and entitlement, the more likely the precise meaning of the rights so established is likely to be litigated. But are there, as well, technical features of the way legal rules are drafted that serve to encourage, or inhibit, civil litigation?

Some commentators believe that greater precision in legislative rules, and especially better statutory definitions of terms of art will reduce litigation by minimizing legal uncertainty. Indeed, implicit in the mandate of the Civil Justice Review to examine mechanisms to enhance the clarity of the law is the assumption that a significant percentage of civil disputing is caused by uncertainty. The relentless pursuit of clarity as a key mechanism to reduce litigation is, however, a dubious enterprise. For it rests on a model of how the



process of interpretation and application of written legal rules works that, while superficially appealing, is untenable in practice.

The model assumes that most litigation in connection with legislation is over the meaning of the relevant standard. It is presumed that all legal texts—to take a standard example, a statute prohibiting vehicles in a park—are at best approximations of the substance of the legal rule intended to be enacted. The text functions as a guide to judges and litigants in two separate ways. On the one hand, in some “easy” cases adjudicative decisionmaking simply involves the unproblematic application of clear rules to a particular set of facts: the words of a statute have a relatively well-defined core of meaning. Thus, the prohibition in question would apply to a group of teenagers driving into the park in the evening to have a party. On the other hand, these same words in a statute are thought to have a uncertain penumbra of meaning: in such “hard” cases decision-makers must rely on their discretion, and in effect “make law”. Thus, whether a baby carriage or a skate-board is a vehicle in the relevant sense cannot be deduced from the dictionary definition of the word “vehicle”.

The idea behind the call for legislative precision and better specification of statutory definitions is that by making rules more precise, one can reduce the penumbra of uncertainty around legal texts. Precise rules, it is believed, limit decision-making discretion and therefore discourage litigation designed to convince decision-makers to exercise that discretion in one or another fashion. Moreover, it is said that detailed definitions can be used to clarify obscurities or conflicts in prior judicial interpretation, and can prevent vague policy arguments grounded in claims of “equity” and “fairness” from improperly colouring legal interpretation. In both ways, legal certainty is enhanced, and extra-judicial settlement of civil disputes is made easier.<sup>47</sup>

At first glance these seem to be attractive propositions that accord with common sense. But they are flawed because they misunderstand the function of rules in the decisional process. First of all, legal rules are not self-evident and self-applying characterizations of human behaviour. Their function is not to provide a single authoritative description of conduct or a specific answer for any given human conflict. Consider the first point. When a legal rule purports to provide that a punch on the nose can give rise to an action in battery, this does not mean that other characterizations of the punch—a pay-back, a tease, and so on—cannot be equally authoritative.

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<sup>47</sup> For a brief analysis of different strategies for setting the pitch of legal rules, see C. Diver, “The Optimal Precision of Administrative Rules” (1983) 93 *Yale Law Journal* 65; C. Diver, “Statutory Interpretation in the Administrative State” (1985) 133 *University of Pennsylvania Law Review* 549; D. Jacoby, “Doit-on légiférer par généralités ou doit-on tout dire?” (1983) 13 *Revue de droit de l'Université de Sherbrooke* 255.

In addition, there can be more than one appropriate legal characterization of human conduct. Take the example of unionized, female grocery store clerks engaged in legal picketing on a shopping mall sidewalk. This activity could just as easily be characterized as a matter of labour law as it could trespass to land; it could be analyzed as a matter of gender discrimination or as a matter of freedom of expression.<sup>48</sup> In other words, legal characterization is only a statement about how the law understands such conduct. Its function is to provide hypotheses (even multiple hypotheses) of argument by which certain types of human interaction may be understood, argued about, and solved or avoided.

It is for this reason that, in themselves, legal rules can never stop litigation, even where they seem to be relatively precise and straightforward. An example from constitutional law is illustrative. In the United States, the absence of a constitutional guarantee relating to security of the person has led to a situation where the guarantee of property is used to achieve protection of interests which in Canada would be argued as falling under the notion of security of the person: for example, the right to social security benefits, the right not to be thrown out of public housing, etc. In Canada, the absence of a constitutional guarantee of property has led to a situation where the security of person guarantee has been invoked (albeit without much success to date) to protect what are essentially property interests. No amount of linguistic precision of legal rules will prevent the deployment of legal rules as arguments designed to advance client interest, since the formulation and structuring of legal argument is one of the primary functions of legal rules.

There is another reason why a proliferation of detailed statutory rules is unlikely to reduce litigation. Even when invoked by judges in giving judgment, legal rules do not solve problems. Their function in the process of decision-making is primarily one of justification, not discovery. Just as legal rules shape the arguments that advocates raise before courts in pursuing client interest, legal rules permit the court to speak to lawyers in the language of the rules they have invoked. They permit the court to justify a decision on the basis of a set of facts and arguments presented to them. But to decide that a given rule can cover the situation presented, to decide that it is congruent with the facts presented, and to decide that a convincing argument in justification can be marshalled on the basis of those rules, are all intellectual steps that are not controlled by the rule itself. That, after all, is why we take so much care in appointing judges and why we describe their official duty as the exercise of judgment.

Another example relating to the prohibition against vehicles in the park will demonstrate why even “linguistically clear cases” have the capacity to become hard cases. All would agree that an ambulance constitutes a vehicle in the

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<sup>48</sup> For exactly this type of situation, see *Harrison v. Carswell* [1976] 2 S.C.R. 202.

dictionary sense of the term. But does this automatically mean that the driver of an ambulance entering a park to take a heart attack victim to hospital would infringe the prohibition? All would agree that a Chevrolet constitutes a vehicle in the dictionary sense of the term. But does this automatically mean that the driver of a Chevrolet who swerves, *in extremis*, into a park so as to avoid a child who has darted into the street would infringe the prohibition? Whether a particular case falls within the range of cases covered by a legal rule is not finally determined by the dictionary meaning of the words contained in a statute. So many other social, institutional and situational factors impinge that the letter is constantly giving way before a highly complex construction of the perceived purposes and intent of a rule.

Not only will a proliferation of detailed legal rules not reduce litigation, it might actually exacerbate the problem. The more rules there are, the greater the tendency to be legalistic (that is, write a judgment referring only to narrow semantic points) rather than to reach solutions on the basis of the policy of the law and its overall systemic logic. As any decisionmaker will explain, it is superficially much easier to “decide” a case either way where there are a plethora of rules—the more detailed the better. While each rule has an ostensible target, each rule carries its exceptions, its counter rules and its capacity for interpretation. The greater the precision of the rules, the greater the chance that a decision can be taken without the judge ever having to be explicit about why a particular result is reached. The vortex of legal precision is aptly revealed in the constant thrust and parry of amendments to the *Income Tax Act* and the tax avoidance schemes conceived by sophisticated practitioners.

It is also to be noted that a particular kind of legislative precision—that flowing from what are called “bright line” rules—can often be productive of litigation. A bright line rule takes as the criterion for its application some relatively uncontested “fact”. Bright line rules do seem to provide clear solutions. Hence a rule that firefighters must retire at age fifty-five appears at first blush to give decisionmakers a more precise standard than a rule that firefighters must retire when they are no longer capable of doing their job. But law is not a game played for fun. Legal rules are purposive instruments designed to guide human conduct. The age fifty-five rule is, presumably, intended to ensure an effective fire brigade. For this purpose, however, it is both under-inclusive (some fifty-four year olds may no longer be capable of the required physical performance) and over-inclusive (some fifty-six year olds may still be capable of effective firefighting). Litigation over instances of under- and over-inclusion is rarely precluded simply because the applicable legal standard has been enacted as a bright-line rule. Only if the specific content of the rules is irrelevant can it be said that bright-line rules will be more effective in reducing litigation than more general standards.



This suggests a final observation. Legal rules rarely have single purposes. Take the fire brigade example. It may be that the rule initially was enacted simply to ensure an orderly regime of retirement, recruitment and training that can be reasonably will-plotted in advance. Here a bright-line rule is less likely to be over- or under-inclusive because its intent need not be measured against any particular factual basis. But even were recruitment policy the sole reason for the rule at the time of its enactment, once enacted legal rules quickly attract other policy justifications. The need to ensure an able-bodied fire brigade is one such justification. These *ex post facto* policy rationales are, moreover, invariably substantive rather than formal, and therefore likely to generate over- and under-inclusiveness problems. In addition, any legal rule structures marketplace responses and generates claims of “reliance”. Soon, these responses become incorporated into the policy rationale for the rule as well: retirement plans and annuities are purchased on the basis of actuarial tables developed in relation to the age 55 rule; employment equity orders are made on the same calculus. Those who seek to contest these collateral arrangements necessarily will have to reconcile these conflicting policy justifications, regardless of the formal configuration of the rules.

Legal rules do not decide cases, no matter how many there are and how precisely they are drafted. Increasing their number or their precision multiplies the tools for argument and justification, and guides these arguments and justifications into a certain form. This is not to say, however, that how legislative rules are written has no impact on civil disputing: incoherence, confusion and contradiction in the law will sometimes generate lawsuits—at least until an appellate court resolves the incoherence. And yet, if the legislative system is truly in disorder this may discourage litigation because the ability to predict outcomes is diminished. Of course, it is not being argued that the legislature should consciously choose to create confusion as a way of reducing litigation. Nevertheless, without a good fix on how much litigation is actually stimulated by legal uncertainty, and without a good fix on whether it is **certainty** that reduces litigation by facilitating settlement, or whether it is **uncertainty** that reduces litigation in favour of other dispute settlement institutions whose jurisprudence is more predictable, it is difficult to gauge the impact of legislative form on rates of litigation.

The above discussion suggests that the precision or imprecision of legislative rules is probably not a major component of the equation relating to rates of litigation. Whether or not to recognize civil disputes by statute and whether or not the statute is written so as to create new rights and distributive effects are by far the more important factors. The Civil Justice Review Task Force should, of course, squarely confront the question about the optimal precision of legislative rules as a means of asking legislatures to reconsider how to achieve the best fit

between legislative policy and legal text; but it should also note the marginal impact that this is likely to have on rates of litigation.

### 13. THE IMPACT OF LEGISLATIVE RESTATEMENT OR REFORM OF THE COMMON LAW ON RATES OF LITIGATION

The fact that, apart from the statutory administrative law of agencies, boards and tribunals, much of the law governing civil disputes in Ontario remains non-statutory Common law has already been noted. Would reforming and rewriting this Common law in legislative form help to reduce litigation? That is, independently of the substance of the reform, independently of the number of social and interpersonal conflicts that exist in the relevant field, is it possible to affect rates of litigation through attention to the linguistic form in which a legal rule is expressed? Phrased like this, as it is in the mandate of the Civil Justice Review Task Force, it is obvious that the question is, at bottom, a variant on the question posed in the immediately preceding paragraphs.

Once again the policy dilemma is caused by unrealistic assumptions about how legal rules function in characterization and in decision-making processes. No doubt, litigation serves in many cases to set the contours of application of a legal rule. Thereafter, a substantial amount of bargaining takes place on the basis of these judicial determinations.<sup>49</sup> Absent reasons of principle or vindictiveness for pursuing litigation, a stable rule is likely to produce more settlements and less litigation than a new rule. Indeed, not much litigation is caused by uncertainty traceable to an *ex ante* lack of clarity in Common law rules; by contrast, much does flow from deliberate attempts to seek uncertainty in order to “reform” the law.

As noted, the legislature seeking to reduce the Common law to writing will usually adopt one of two techniques. On the one hand, the legislature may simply attempt a restatement, consolidation and systematization of existing rules, without a conscious law reform agenda. This, for example, was the objective pursued by the Codification Commission in Lower Canada, although not, to be sure, that pursued in the elaboration of the *Civil Code of Québec* in 1994.<sup>50</sup> On the other

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<sup>49</sup> See, for a discussion of the process, G. Priest and P. Klein, “The Selection of Disputes for Litigation” (1984) 13 *Journal of Legal Studies* 1, and M. Galanter and M. Cahill, “‘Most Cases Settle’: Judicial Promotion and Regulation of Settlements” (1994) 46 *Stanford Law Review* 1339.

<sup>50</sup> On these two approaches to codification and their implications for the legislative endeavour, see J.E.C. Brierley, “The Renewal of Quebec’s Distinct Legal Culture: The New *Civil Code of Québec*” (1992) 42 *University of Toronto Law Journal* 484.

hand, the legislature may actually try to reform the law at the same time it reduces the Common law to statutory expression. Given the general antipathy of common lawyers to legislation for its own sake, legislative restatement of the Common law invariably carries with it a reform agenda.

How, then, might the legislature go about restating or reforming the Common law so as to reduce litigation or to make it more efficient. One can start with the proposition that, in principle, reform of the Common law is likely to have the same impact—little—on rates of litigation as reform of existing statutes. Previous observations about the effect of legislative precision are also appropriate to Common law reform. But where reform of the Common law is in issue, the legislature confronts an additional problem. Unless these reforming statutes are organized along the lines of a Civil Code, they can never be comprehensive. That is, they will always have to be integrated into an underlying body of non-statutory Common law. To take one example, the *Sale of Goods Act* purports to govern the key elements of chattel sales transactions, but it necessarily presupposes an underlying unlegislated Common law of contracts. For this reason, even where they do not reform the law in the classical sense—that is, even where they do not rebalance socio-economic power between categories of plaintiff and defendant—and there will still be litigation about how the new statute is to “fit” in with existing law. It follows that, in actual practice, new legislation of any description is typically a boost to litigation, rather than the reverse.

One legislative strategy to overcome this particular difficulty is to enact more embrasive statutes—mini Civil Codes. Thus, the *Personal Property Security Act*, the *Construction Liens Act*, the *Family Law Act*, and the *Succession Law Reform Act* can all be seen as attempts to minimize problems of integration and fit by redefining entire sectors of the private law. In all these cases, the new legislation not only restates parts of the Common law, it also consolidates a number of existing statutes dealing with specific issues or events. The effort to produce more embrasive legislation has, it would appear, reduced litigation designed to establish the internal fit of these new statutes. But it is far from clear that it has had much beneficial impact on rates of litigation generally.

In the first place, because most such legislation in respect of the Common law is reformist in tenor, it will almost always attempt to rebalance socio-economic power by creating new “entitlements and rights”. And there is nothing like a new right to spur litigation. In addition, the very act of restating the Common law implies a finding a formulaic rendition in canonical language of a legal rule that previously had no fixed formulation and that had a variable scope. To take one example from the law of civil procedure, discovering whether a “statutory power of decision” in the *Statutory Powers Procedure Act* embraces the same reality as the *quasi-judicial* function in the Common law of



administrative procedures, has stimulated (and continues to stimulate) a great deal of litigation of the ordinary “fit” variety.

Another legislative strategy for minimizing questions of fit in relation to statutory reform of the Common law is to create a tribunal with a specialized jurisdiction in order to administer the new law. This technique probably does minimize litigation having for object the fit of the new statute, but it generates at the same time litigation having for object the fit of the new tribunal. This is especially true in fields such as labour relations law, where the new statute consciously attempts to change the underlying assumptions of the Common law being reformed. The explosion of legislation about judicial review of administrative action over the past thirty years is, in large part, the public law equivalent of civil litigation over the fit of new statutes. Because our constitutional system does not permit aggrieved parties to re-litigate the meaning of a particular statute before the courts directly, they re-litigate its meaning by litigating the jurisdiction of the decisionmaker, that is the fit of the tribunal within the Common law.

The language of “fit” that has been used in the above paragraphs suggests that problems with the legislative reform of the Common law are essentially technical. This is certainly not the case. The expression fit is meant to capture all of: “linguistic fit”—do the words deployed in the statute resonate with the conceptual framework of the pre-existing Common law? “technical fit”—does the pre-existing Common law provide the necessary soil for the statute to take root, or will courts have to invent complementary doctrines? “substantive fit”—does the new statute fundamentally change basic Common law principles, such as substituting “no-fault” for “fault-based” liability? “institutional fit”—does the new statute create a new institution with a competing jurisdiction to that of the Common law courts?

It is not the purpose of these paragraphs to examine the impact that reform and restatement of the Common law by courts themselves (rather than legislatures) might have. But some brief observations are in point. To begin, roughly the same conclusions about rates of litigation may be drawn in connection with judicial reversals or reformulations of Common law rules. Each time an appellate court announces a new doctrine or offers a new interpretation, there will be a flood of cases designed to explore its limits. Indeed, new Common law doctrine functions much like new linguistic expression in legislative rules. Just as the English language lived a decade where everything “impacted on” or “interfaced with” everything, so too the law has lived a decade where every conceivable problem was seen as one involving “procedural fairness”, “reasonable expectations”, “unjust enrichment”, “constructive trusts”, “fiduciary duties” and “reasonable notice”. However important it may be for courts constantly to undertake reform of the Common law (or in the colourful phrase of the English jurist Lord Mansfield, to allow the Common law “to work

itself pure”), one should not be deluded into thinking that appellate restatement of the law will automatically lead to less litigation.

To conclude, it is difficult to see how thoughtful statutory restatement or reform of the Common law will have a significant impact on rates of litigation. This is true whether legislative activity is merely intended to rationalize conflicting doctrines and to clarify obscurities, or whether it is intended to modify the Common law. This is also true whether the purpose of the legislative reform is *ex post facto*—that is, designed to clarify emerging judicial doctrines stimulated by litigation on the margins of existing law, or whether the purpose of the legislative reform is *ex ante* or anticipatory—that is, designed to clarify in advance the limits of potential judicial doctrines stimulated by litigation on the margins of existing law. And this is true whether reform of the Common law occurs by means of the creation of administrative tribunals or the enactment of mini-Civil Codes.

Any reduction in rates of litigation flowing from linguistic clarity is likely to be offset by an increase in litigation designed to test the fit and the scope of the reform initiative. More profoundly, especially where real law reform has occurred, there will be litigation designed to refight political battles in a new arena. It follows that, however many good reasons there may be for restating or reforming the Common law—substantive fairness, the pursuit of equality, incoherence of basic doctrines, rationalization of previous reform attempts—reducing the volume of litigation is not one of them.

#### 14. LIMITING LEGISLATIVE ATTEMPTS TO RIGHT ALL PRIVATE WRONGS AS A MEANS FOR REDUCING LITIGATION

The preceding discussion might be taken as no more than the typical reactionary argument: from the perspective of reducing the incidence of civil litigation, there is no utility whatever in attempting either to clean up the statute book or to reform and restate the Common law. More radically, it might be understood as an argument that preventing legislative law reform might actually help to solve some of the problems that the Civil Justice Review was created to address. In other words, it might be concluded that the hazards of legislation of any type are so great that nothing should be done.<sup>51</sup> These would, however, be false conclusions. Moreover, even if preventing unwise legislative law reform were a noble goal to pursue, it is impossible to achieve.

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<sup>51</sup> The recent recodification exercise in Quebec has provoked a flurry of suggestions to this effect. See, for example, M. Tancelin, “Les silences du *Code civil du Québec*” (1994) 39 *McGill Law Journal* 747.

The production of law (as much as the spending of money on various public purposes) is a political commodity. Political parties compete to offer new programmes, and these new programmes typically confront governments with choices about the appropriate instruments to pursue them: taxation, subsidies, Crown Corporations, regulatory agencies, the criminal sanction, the creation of new civil causes of action, and so on. Concerns about excessive regulation, the size of government, and the deficit have recently directed attention away from administrative agencies, Crown Corporations and especially expenditure programmes such as subsidies and tax relief, and towards the criminal law and civil causes of action as a means of policy implementation. If the electorate wants the legislature to fix a problem by legislation and votes for a political party promising to do so, it is unlikely that prudential arguments about the limits of the civil law and the hazards of law reform will carry much weight. To the extent that the public thinks (or has been induced to think) that law is competent to solve a given social problem then there will be legislative activity directed to this end.

Hence the current dilemma. Law is not, in principle, self-executing. Nor is it cost free. Even the creation of new civil disputes to be adjudicated in the ordinary way before the Common law courts always involves administrative and social costs. In some cases these costs are increased because legislatures attempt to enhance the execution of legal rights by creating public enforcement agencies. For example, in Ontario today, the collection of alimony and support, the prosecution of labour standards grievances, the investigation and conciliation of human rights complaints all imply the use of public enforcement agencies to assist the pursuit of private rights.

But even in cases where enforcement is private there is still a cost to enforcement. Much of this cost falls any on private parties who must pay for the cost of litigation. Sometimes a part of the cost of vindicating rights is assumed by the State (through legal aid and analogous systems). More to the present point, however, in the vast bulk of cases of private enforcement of legal rights, the cost of law is also borne by the court system. Our present system of civil justice provides an entire apparatus of dispute settlement (courtrooms, judges, officials) at virtually no cost to litigants. Only in cases of private arbitrations or mediation, where disputants themselves must remunerate the decisionmakers, are these systemic costs passed on to litigants.

By contrast to the case where the pursuit of civil justice implies direct governmental expenditure (as in the case of administrative agencies charged with pursuing civil disputes or enforcing judgments rendered), the cost of private law enforcement through the judicial process can usually be externalized or hidden. Frequently it is the courts that bear these costs. Of course, where judges themselves decide to recognize a new cause of action, they bear responsibility for opening the floodgates to whatever litigation ensues. Yet in large measure



judges have little direct say in specific decisions about how the legislative process generates new law.

This is not to say that judges are powerless to influence the legislative process. Often it is what are perceived to be “perverse” judicial interpretations of existing law that move legislatures to act. Sometimes the courts overtly exhort the legislature to change the law. In addition, the judiciary is routinely consulted prior to enactment of a new statute. Judges are frequently seconded to Law Reform Commissions. But in most such cases the consultation is about the substance or policy of the reform, and not about its civil disputing consequences.

It is also worth noting that judges can exercise after-the-fact input into the civil disputing consequences of new enactments. Their interpretations can enlarge or narrow the scope of statute, and on occasion can impel amendments. Where the legislature seeks to create an administrative procedure to deal with a particular set of problems, courts can accept the jurisdictional delegation or they can maintain (and even increase) their workload by taking an activist approach to judicial review. In other words, courts are not entirely without resources to influence the legislature and to control their own caseload. But, except on those rare occasions where courts refuse to recognize a new, or extend an existing, cause of action for “thin edge of the wedge” reasons, their attention and input is directed to questions of substance, not process. One might well wonder how legislation which delegates broad discretionary powers to judges and which often makes it difficult for opposing parties to join issue either on the facts material to decision or the relative weight of the criteria for decision (in both cases leading to lengthier and more complicated trials), would be reformulated were judges and other court officials asked for their views.

Asking the judiciary and court officials for their views about the impact of proposed legislation is not unlike the notion of rule-making audits in administrative law. These audits, intended to determine the cost of new regulatory initiatives for those meant to be subject to the regulation, is a model for monitoring the impact of legislative initiatives that can be exported to the civil justice system. Obviously, one cannot directly prevent legislatures from enacting statutes, but one might wish to modify the legislative process so as to oblige Parliament to undertake pre-enactment audits so as to determine the projected effect of a new statute on the civil justice system; and one might also wish to oblige Parliament to undertake five and ten year post-enactment audits to monitor the actual impact of its various initiatives on the nature and rate of civil disputing. A complementary pre-enactment mechanism would be to create, in connection with all new legislative proposals, the equivalent of the Treasury Board—a specialized body charged with riding herd on ill-advised attempts to circumvent controls on spending programmes by legislation likely to have an impact of the civil justice system disproportionate to the benefit produced.

It should not, however, be imagined that a system of pre-enactment audits would be cost-free. Every procedural reform to the process of legislative reform is subject to the same vagaries and produces the same types of consequence as substantive law reform. Requiring pre-enactment consultation will raise the cost and lengthen the delay of legislating. It will increase the political vulnerability of governments seeking to engage in real law reform by multiplying the opportunities to overturn or modify the outcome of policy battles lost at the ballot box. It will allow those opposing new legislation to dilute its scale, scope or substance by organized lobbying. But from the special perspective of the Civil Justice Review—the reduction in rates of litigation attributable to legal change—its benefits are uncontestable.

The above observations suggest an underlying logic to reform of the civil law. The ambition of the law reformer cannot be to attempt to solve problems. It can only be to trade in old problems for a better class of problem in the new law.<sup>52</sup> Instrumental law reform of the type designed to rationalize the law works best where it disrupts least. Because its purpose is to enhance the efficiency of the system, instrumental law reform should be undertaken only where the anticipated costs of new litigation will be less than the inefficiencies of old doctrines.

By contrast, and especially where law reform has as its principal motivation the desire to reorient the substance of the law by means of attributing new rights, civil disputing will continue to increase as a way of debating in a judicial or administrative forum those political questions previously lost in the legislative forum. And, finally, where law reform is designed to change the symbolism of the law as well as its substance (where for example, the relationship of spouses is to be restated as a relationship of equality rather than a relationship of patriarchy—so that possible increased rates of litigation are not perceived as a central problem), the legislature must still operate on the premise that the civil disputing costs of law reform must always be weighed as against its potential benefits.

These lessons about the reciprocity of means and ends—already internalized by the judiciary and by administrative decisionmakers who necessarily pay the price of their not having been learned, and by officials in the Policy Development Branch of the Ministry of the Attorney General and by Law Reform Commissions whose mandate necessarily extends to systemic considerations—must be brought front and centre in public and political debate

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<sup>52</sup> I have tried to trace through this logic of legislative law reform in R.A. Macdonald, "Reconceiving the Symbols of Property: Universalities, Interests and Other Heresies" (1994) 39 *McGill Law Journal* 761.

if the goals of an economical, efficient and accessible civil justice system are to be seriously pursued.<sup>53</sup>

## SECTION B. THE FORMULATION OF CIVIL DISPUTES

### 15. CHOOSING AN INSTITUTIONAL PROCESS

Once a legislature (or a court, or any other public institution) has decided to recognize an interpersonal or social conflict as a civil dispute, it must then decide how to give that recognition concrete legal expression. As previously intimated, this decision has several dimensions. Some of these, such as whether or not to frame a legal rule in statutory form and how precisely to state the rule, have already been discussed at length. But the policy choices in issue here also go to questions of institutional design—selecting an appropriate governing instrument and an appropriate decision-making process.

When a civil dispute is recognized legislatively, Parliament must first select the institution to which it allocates authority to handle the dispute: is this the type of problem that should be decided by a public servant, a specialized administrative agency, a minor judicial official, a judge, an arbitrator or arbitratix, or even the Cabinet? It must also choose a decisionmaking process: is this the type of problem that should be decided by an adjudicative process, by mediation, by an electoral process, or even by a rule of thumb such as “first come, first served”? Parliament must then decide exactly how it shall formulate the legal entitlements in question: is this type of problem best regulated by reference to a general principle, a precise rule, or a discretionary standard to be elaborated by decisionmakers (typically the courts) on a case-by-case basis? And finally, it must choose what type of remedy it will permit the decisionmaker to grant: is this a type of problem where an aggrieved person should be permitted to claim monetary damages, or should the decisionmaker have the power to require one party to do what was initially promised (specific performance), to disgorge an object being held unlawfully (restitution), or to refrain from doing something (prohibitive injunction), or even to require one person to continue to do something under the ongoing supervision of the decisionmaker?

While in Canada today these types of decisions are taken primarily by the legislature, many also confront the courts. Not only when performing their function of developing the Common law, but also when engaged in the process of statutory interpretation, judges must weigh the impact that any particular

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<sup>53</sup> An excellent discussion of this problem in law generally is provided by Lon Fuller, “Means and Ends” in K. Winston, ed., *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Durham: Duke University Press, 1983) at 47.



decision they make is likely to have on future allocations of decisionmaking responsibility, decisionmaking process, formulation of legal entitlement and available remedy. For example, the decision by a court in a medical malpractice action or in a patent infringement case to empanel an expert to assist it in evaluating the expert evidence marshalled by each of the parties to the action, changes both the effective locus of decisionmaking from judge to expert, and the process from an adversarial adjudication to either an inquisitorial form of adjudication or a more managerial process. Again, the decision to award damages in the form of monthly payments that may be revised periodically rather than as a lump sum, and the decision to issue an injunction to prevent one party from continuing to picket a worksite or a medical clinic, necessarily involves the courts in an ongoing supervision of the order rendered, and adds a bureaucratic function to the court's traditional adjudicative role.

Even though courts and legislatures are the most high profile of those public institutions charged with the formulation of civil disputes, the importance of the role played by other officials cannot be discounted. Various regulatory administrative agencies have authority to enact (or recommend the enactment of) subordinate legislation. The issues they confront in doing so track very closely those faced by Parliament although, to be sure, they are more circumscribed. These same agencies are typically invested with decisionmaking powers closely analogous to those of Common law courts. Here again there is great similarity in the intellectual tasks confronting administrative tribunals and Common law courts. And just as the government can ask Parliament to allocate resources and personnel to the discovery and administration of certain types of civil dispute, so too an administrative agency can allocate its financial and human resources to achieve like purposes. It follows that the manner in which each administrative decisionmaker and each agency choose to formulate those civil disputes in respect of which they exercise jurisdiction is equally as important as the way legislatures and courts make the same choices.

The premise of this section is that decisions of institutional design, whether taken by legislatures, courts or administrative agencies, will have as great an impact of the rate and nature of civil litigation as the initial decision to give legal recognition to a social or interpersonal dispute through civil law rules of duty and entitlement. That is, alternative formulations of the same legal entitlement can either exacerbate litigation tendencies or reduce the volume of litigation without at the same time affecting the substantive outcome in individual cases. This Study Paper is not the place to set out a comprehensive analysis of the various principles, processes and institutions from among which such choices may be

made.<sup>54</sup> But the nature of the exercise, and the kinds of inquiries it opens up about whether certain types of civil disputes can or should be handled elsewhere than in the regular court system merits attention. Given the *raison d'être* of the Civil Justice Review one such institution—the courts, and one such process—adversarial adjudication, stand out as targets for such an investigation.

For various reasons—constitutional, historical, symbolic—the present system of civil justice in Ontario assigns pride of place to the Common law courts as the institution for resolving disputes. Unless there is a special reason for attending to questions of institutional design, both the legislature and the general public reflexively presume the following equation: vindication of legal rights = judicial process in the regular courts. The very existence of the Civil Justice Review, however, suggests that we may have too long been operating with unrealistic assumptions about the kinds of individual conflicts and social problems that can be solved efficiently in this manner. After all, many societies and many legal systems do not have institutions that are easily recognizable as courts and do not automatically characterize interpersonal conflict in the language of a civil dispute.<sup>55</sup>

Any number of inquiries are pertinent to excavating assumptions about judicial adjudication. What exactly is it that we find admirable and worth preserving in the court system? Is the independence of the judiciary the key element? Is it the status, authority and probity of individual judges that makes the judicial process attractive? Do the symbols of an elevated bench, robes, formal procedure and explicit deference enhance public confidence? Do all courts inspire equal public confidence? And do courts inspire equal confidence among all members of the public? Might it be the decisionmaking process of courts that is held in esteem? What do we find attractive about adjudication? Are there specific features of adjudication that limit the kinds of issue that can be decided by courts? Can the process of adjudication be redesigned so as to enhance its efficiency—for example, by substituting an inquisitorial process for an adversarial process of decisionmaking? Would relaxing the rule of *stare decisis* increase or decrease litigation? Finally, to inquire into the system of judicial

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<sup>54</sup> Compare R. Abel, "A Comparative Theory of Dispute Institutions in Society" (1973) 8 *Law and Society Review* 217; E. Johnson, "Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions" (1980-81) 19 *Law and Society Review* 567; G. Priest, "The Selection of Disputes for Litigation" (1984) 13 *Journal of Legal Studies* 1.

<sup>55</sup> The classical U.S. citation is E. Hoebel and K. Llewellyn, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, (Norman: University of Oklahoma Press, 1941). See also, L. Nader and H. Todd, *The Disputing Process: Law in Ten Societies* (New York: Columbia University Press, 1978), and W. Felstiner, R. Abel and A. Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming and Claiming ..." (1980) 15 *Law and Society Review* 631.

adjudication necessarily leads to an examination of the role of lawyers in the civil dispute resolution process. Would excluding lawyers from certain judicial institutions (as Quebec has done in its small claims court) reduce the amount of civil litigation without compromising the achievement of justice? Or are lawyers an essential component of all types of legal conflict resolution?

Together these questions reveal the nature of the choices that a legislature implicitly makes when it assigns a civil dispute to the courts. In such cases, the presumption is that the judicial process reflects an optimal matching of a particular social problem with: (i) a particular mode of dispute settlement (adversarial adjudication), (ii) a particular institution for pursuing that dispute settlement process (a court), (iii) a particular form of making law (rules of duty and entitlement), (iv) the particular type of remedy one wants that institution to offer (damages, specific performance, injunctions), and (v) the kind of advocacy one wishes to authorize (the participation of trained lawyers). This presumption may prove false or inapt in five different ways: there may be certain types of problem that traditional judicial adjudication is not well suited to handling; there may be certain combinations of decisionmaker, process, entitlement, remedy and advocacy that are inefficient or incoherent; there may be significant varieties in the judicial process as between different courts; these assumptions about what actually goes on in courts may actually be counterfactual; and the role of professional advocates in the litigation process may be less central than commonly thought. It follows that, before one can even begin to assess whether certain types of civil disputes should be allocated elsewhere than to the ordinary civil courts, it is necessary to get a better sense of what it is that characterizes the activity of these ordinary courts, and what values we think judicial adjudication is promoting.<sup>56</sup>

## 16. THE FORMS AND VARIETIES OF ADJUDICATION

There is a substantial literature in the United States supporting the demonstration in the first section of this Part that legislatures need not choose to formulate the civil law in the manner of rules of duty and entitlement. Apart from learned work in the realm of civil procedure, however, there has been much less consideration of what judicial adjudication actually consists of: what, if anything, are its essential elements and what are peripheral, contingent, and

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<sup>56</sup> For an attempt to explain the values that inhere in public, judicial decisionmaking see O. Fiss, "The Forms of Justice" (1979) 93 *Harvard Law Review* 1; "Against Settlement" (1984) 93 *Yale Law Journal* 1073; "The Death of Law?" (1986) 72 *Cornell Law Review* 1.



culturally relative?<sup>57</sup> This lack of analysis probably accounts for the fact that, when commentators call for dejudicializing Ontario's civil justice system, it is often difficult to determine exactly what is meant. Do they have in mind alternatives to courts, or alternatives to the adversarial process, or alternatives to adjudication as a form of social ordering, or alternatives to any kind of public dispute-resolution bodies, or some combination of the above?

Critics of the current system of civil justice in Ontario often have little information about or insight into the number, nature and diversity of existing institutions for civil disputing. Ontario already knows of several publicly-sponsored alternatives to courts (administrative tribunals), to adversarialness (inquisitorial procedures and arbitration *ex aequo et bono*), and to adjudication (conciliation and mediation). There are, in addition, a panoply of private and semi-private dispute resolution agencies and processes ranging from labour mediation, conciliation and arbitration services, to commercial arbitration bodies, to Better Business Bureaus to Consumer Hot-Lines. What is more, alternatives to adversarialness and adjudication are already present in the judicial system itself. Most courts in Ontario today perform on a routine basis a variety of tasks that cannot really be described as classical adjudications; or they undertake adjudications following a procedural model more in keeping with the inquisitorial systems found in continental Europe. Finally, judges themselves are often called upon to act extra-judicially as *personae designatae* under different administrative law regimes. Whenever they are charged as statutory officials, or are required to resolve complex adoption and custody cases, or are instructed to help mediate a dispute brought before them, judges are performing non-adjudicative functions.

In order to illustrate the diversity of tasks currently assigned to the civil courts in Ontario (and to their judges), it is helpful to begin with a rudimentary model of adversarial adjudication. Of course, the point of elaborating such a model is not to proclaim that it is the only acceptable model for structuring the judicial function; rather the idea is to set out an analytical template that can be used to differentiate dispute resolution processes that constitute the run-of-the-mill activity of the judiciary from those that resemble adjudication in one or more particulars.<sup>58</sup>

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<sup>57</sup> See, however, M. Shapiro, *Courts: A Comparative and Political Analysis*, (Chicago: University of Chicago Press, 1981). For a more recent Canadian perspective see G. Watson, *Dispute Resolution and the Civil Litigation Process*, (Toronto: Emond-Montgomery, 1991).

<sup>58</sup> The following discussion takes as a point of departure the conception of adjudication advanced by Lon Fuller in "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353. Some have taken Fuller's ideas as offering a "true description" of adjudication rather than as an application of Max Weber's "ideal type" methodology of sociological investigation to legal institutions. For critical assessments of Fuller's model when misapplied prescriptively to characterize certain types of civil disputes, see John Esser, "Evaluations of Dispute Processing:

Adversarial adjudication in Common law systems is centrally about (i) the marshalling of proofs of fact and arguments of law, (ii) by parties to a dispute, (iii) before an independent and neutral third party, (iv) whose decision must be strongly responsive to the proofs and arguments presented. These features of adjudication, often only implicit in *Judicature Acts* and the Rules of Practice of trial courts, have recently reached symbolic prominence through the constitutional doctrine set out in section 7 of the *Charter of Rights and Freedoms*. Section 7 provides that the right to life, liberty and security of the person may not be compromised except in accordance with the principles of fundamental justice.<sup>59</sup> This notion of procedural due process is itself an encapsulation of two long-standing principles of administrative law known as the rules of natural justice: *audi alteram partem* (let the other side be heard) and *nemo iudex in causa sua debet esse* (let no person be a judge in his or her own case). Procedurally, the two principles have been traced out in a lengthy inventory of presumed essential elements of adjudication—ranging from the rules of acceptable evidence, to the manner of its presentation, to the participation of lawyers, the recording of a transcript, the control of attitudinal bias, the requirement of reasons for decision, the right to an appeal, and so on. For the past two decades in Ontario they have found formal legislative expression in the *Statutory Powers Procedure Act*, an enactment that purports to codify the adjudicative processes of officials exercising statutory decisionmaking authority.

But not all adjudication need be carried out according to the model set out in the Rules of Practice of the Ontario Court (General Division), or the *Statutory Powers Procedure Act*. Just as there can be a variety of ways in which the rules of natural justice are attenuated and adapted in administrative law through the notion of procedural fairness, so too there can be a variety of ways in which these same principles are attenuated in classical judicial adjudication. Nothing requires that adjudication always be undertaken by means of a strictly adversarial system for presenting proofs and arguments: for example, an adjudicator chosen on the basis of presumed expertise may well be an active participant in the fact-finding and law-finding process. Nothing about adjudication demands that all decisionmakers be free of attitudinal bias: for example, in a tri-partite panel two of the three members could well be appointed by each of the disputing parties. Nothing inherent in adjudication requires that there be an appeal from the decision of an adjudicator: any form of adjudication can be as final as a decision of the Supreme Court of Canada.

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We Do Not Know What We Think and We Do Not Think What We Know" (1989) 66 *Denver University Law Review* 499.

<sup>59</sup> See, for a discussion of the relationship of this guarantee to other procedural principles of the Common law, R.A. Macdonald, "Procedural Due Process in Canadian Constitutional Law: Natural Justice and Fundamental Justice" (1987) 39 *University of Florida Law Review* 217.

These observations suggest that expectations and understandings about the ordinary judicial process in Ontario may well be driven more by mythology than by reference to actual practices. Nevertheless, there are some features of the classical notion of adjudication that at first glance seem to limit the scope of the process. These features might be thought to differentiate “true” adjudication from its close analogues among processes where a third person (and not the parties themselves) actually decides the dispute—namely consultative processes and managerial processes. Several examples will illustrate both the force and the weakness of attempting to define the distinguishing elements of adjudication by reference to decisionmaking procedure.

Where a third-party decisionmaker is empowered to decide on the basis of fairness and equity (*ex aequo et bono*) one of the key features of classical adjudication is compromised: the justification of the decision is no longer strongly responsive to claims of right finding their origin in pre-existing legal rules. But today, and especially in cases involving the partition of family assets upon marriage breakdown or in determining the extent of *post mortem* support obligations (dependants’ relief), courts are often required to weigh equitable considerations. Furthermore, even in run-of-the-mill tort and contract litigation courts are obliged to decide cases on the basis of pre-existing rules incorporating terms like “reasonable person” that, while formulated as fixed standards, are every bit as fluid as the notion *ex aequo et bono*.<sup>60</sup>

Again, where a third-party decisionmaker is expected to bring specialised professional (and typically off-the-record) knowledge to bear on the dispute in question—as for example in connection with deciding industrial design disputes—adjudication in the strict sense is no longer possible: the decision is not based exclusively and sometimes not even primarily on evidence marshalled, presented, and tested by the arguments of opposing parties. But today, and especially in complex fields of economic regulation and corporate-commercial law, courts are often required to decide on the basis of specialized (off-the-record) knowledge, be this formulated in terms of judicial notice, or be it simply the result of their professional training as lawyers.

Where a third-party decisionmaker is expected to decide a broad issue of public policy—as for example, whether a trucking permit should be issued on the basis of public convenience and necessity—once again the assumptions of classical adjudication are put into question: while the decisionmaker may be strongly responsive to the proofs and arguments advanced by the parties, she or

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<sup>60</sup> This, of course, is the civil law equivalent of the point made by constitutional scholars that the general principles contained in the *Charter of Rights and Freedoms* do not, and cannot, strictly control the exercise of judicial discretion. For a balanced discussion of the latter issue, see W. Bogart, *Courts and Country*, (Toronto: Oxford University Press, 1994), at 255 *et seq.*



he will also be influenced by subjective factors and policy considerations in respect of which there is no pre-existing rule to be applied. But today, courts are increasingly being asked either to undertake in the first instance, or to supervise by way of judicial review or appeal, allocative decisions having a heavy overlay of public policy. Even in seemingly ordinary cases involving the calculation of damages, most commentators acknowledge the difficulty of distinguishing so-called objective (or rule-grounded) from so-called subjective (or policy-driven) factors in judicial adjudication.

The upshot of the above paragraphs is that it is virtually impossible to decide the essential features of adjudication either by reference to the character of the decisionmaking office, or the character of the process.<sup>61</sup> At best, one can stipulate a definition of the adjudicative process that reflects an idealized form of current practice, and that appears to capture those features of the process that enhance public confidence in its outcomes. On the basis of this stipulated definition, one can then begin to evaluate the benefit and cost in terms of public confidence of different legislative choices. The question posed when the issue is framed in this manner is: What happens when the legislature assigns this particular type of civil dispute to the courts, or formulates this particular conflict in one way or the other, or modifies certain procedural mechanisms in this particular case? To the extent that it is the features of adjudicative decisionmaking highlighted by the stipulated definition that enhance public confidence in the courts, legislatures should be wary of mandating variations for fear of undermining judicial credibility.<sup>62</sup>

Assuming that meaningful evidence about the confidence-enhancing features of adjudication can be marshalled, any legislative schemes that expressly depart from them should probably lead to a presumption (which Parliament can, of course, overrule) that the process being undertaken is not the kind of adjudication that needs to be managed by the courts. In other words, as an empirical question, it is worth investigating how much public confidence in courts flows from the process, from the mythology surrounding the institution and from assumptions about the integrity of judges.<sup>63</sup>

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<sup>61</sup> One of the first attempts to examine how the character of a dispute influences the nature of the adjudicative process was that of A. Chayes, "The Role of the Judge in Public Law Adjudication" (1986) 89 *Harvard Law Review* 1281.

<sup>62</sup> A particular example of where departures from expected procedures can have the effect of undermining confidence in the process occurs in respect of "mandated settlements". See, for discussion, M. Galanter and M. Cahill, "'Most Cases Settle': Judicial Promotion and Regulation of Settlements" (1994) 46 *Stanford Law Review* 1339.

<sup>63</sup> See R. Morissette, *Les juges, quand éclatent les mythes*, (Montreal: Vlb Éditeur, 1994).

## 17. THE FORMS AND VARIETIES OF JUDICIAL BODIES

Courts in Ontario today perform both tasks that have an identifiable procedural character as adjudication, and also a number of other tasks in which this everyday conception of Common law adjudication is attenuated. In addition, a number of public bodies other than courts are given adjudicative powers. For these reasons it is important to examine the various forms that judicial bodies can take, and more generally, the various forms that third-party decisionmaking can take. A good starting point is to remember that there is not just one type of civil court in Ontario; in fact there is a great diversity of third-party decisionmaking bodies within the judicial system. These differences reflect not only differences in status, but also differences in the nature of the process being undertaken. Not all courts perform identical functions.

The historically significant distinctions between Courts of Equity and Courts of Common Law (quite apart from the substantive body of rules being applied) also affected, among other things, modes of proof, remedies that could be granted and general procedural limitations on judicial discretion. Today some courts are classified under the constitution as “superior” courts and others as inferior courts. This distinction, too, bears not only on questions of substantive jurisdiction, but also on issues like evidence, remedies and process. Today some courts have a highly-specialized subject-matter jurisdiction (Surrogate Courts, Small Claims Courts, Unified Family Courts, Bankruptcy Courts, and so on) and have been authorized to follow specialized processes and grant specialized recourses. Some courts are appellate courts and some are courts of first instance; some have jurisdiction in both first instance and in appeal. Here again, process and remedies depend on what function the court is performing. Finally, the judges of some but not all courts must have been trained as lawyers, and the judges of some, but not all courts, have life-tenure.

A similar diversity may be found in third-party decisionmaking bodies that exist outside the regular court system or that are not called courts. For the sake of simplicity these will all be called tribunals. Sometimes they are highly specialized multi-functional agencies such as labour relations boards, municipal boards, securities commissions, and so on. Sometimes they are simply a judge (or other court official such as a Master) acting as a *persona designata* under a particular statute. Sometimes they are ordinary members of the public service (such as the Registrar of Motor Vehicles). Sometimes the Cabinet itself exercises statutory authority as a judicial-type decisionmaker. It is not only the formal characteristics of these tribunals that are highly variable; it is the functions they perform. Frequently, they exercise what are characterized as “statutory powers of decision” that closely resemble classical adjudication. Sometimes they exercise more complex types of decisionmaking powers that depart in one or another particular from the classical structure of adjudication described above. Sometimes

they even make purely policy decisions that closely resemble those taken by the legislature. What is more, sometimes these bodies make first instance decisions, sometimes they make appellate decisions and sometimes they issue orders that are analogous to those issued by courts.

It follows from the above observations that policymakers and commentators often mistakenly identify certain characteristics as intrinsic to the decisionmaking processes of courts that have little or nothing to do with the tasks they actually undertake. These same policymakers also tend not to acknowledge that there already exists, within the field of administrative law, a vast experience as to the nature and forms of third-party decisionmaking. The allocation of different types of disputes to different judicial and non-judicial bodies tends to be driven by considerations that are largely the product of myths and assumptions about the legal tradition of the Common law rather than inherent in the concept of the judicial function. That is, we rely on the symbolism of judges and courts (regardless of whether the court is acting in an adjudicative capacity) because we associate a certain standard of unimpeachable behaviour with those who serve as judges, and with the external features of public decision-making by a judicial officer. What else explains, for example, the continuing use of judges to chair public inquiries whenever some politically sensitive and highly complex issue needs to be resolved?

More importantly, it is not only individual judges that are used for non-judicial purposes in this way. So is the judicial process itself. In other words, even in cases where section 96 of the *Constitution Act, 1867* would offer no impediment to allocating certain dispute resolution tasks to some other institution, the legislature will sometimes assign to the regular courts certain kinds of problems for reasons that have very little to do with the need for them to be adjudicated, but very much to do with the symbolic importance that it believes attaches to the judiciary today.

The symbolic use of the judicial process is a central fact of Ontario's civil justice system that cannot be understated. If courts are overcrowded, delays are extensive and civil litigation is costly, much of the reason has nothing to do with the underlying nature of adjudication or, still less with the quality of the performance of the judiciary. Litigants often expect to be treated condescendingly in court, want to see a decisionmaker who wears a robe, sits behind an elevated bench and is treated with ostentatious deference by lawyers and court personnel.<sup>64</sup> Whenever, for symbolic or other reasons, courts are assigned tasks to which their institutional processes are not well-suited, or tasks that could equally well be

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<sup>64</sup> See the discussion in S. Merry, *Getting Justice and Getting Even* (Chicago: University of Chicago Press, 1990), and in S.C. McGuire and R.A. Macdonald, "Tales of Wows and Woes From the Masters and the Muddled" (Unpublished manuscript, 1994).



performed by public decisionmaking bodies other than courts, there are likely to be inefficiencies and greater costs in the civil justice system.

This is not to say, however, that judges and courts should not be used for symbolic purposes. Indeed, it may be that the only good reasons for assigning a civil dispute to the courts are symbolic. Given the above observations about the plasticity of judicial functions and the fungibility of third-party decisionmaking institutions, it is difficult to argue cogently that there are purely instrumental reasons for any dispute to be assigned to a body that is officially designated as a court. On such an analysis, one might argue that in the absence of such symbolic reasons, there should be a presumption in favour of assigning civil disputes to institutions outside the regular court system—independently of whether the process followed in adversarial adjudication or some other.<sup>65</sup>

## 18. THE RANGE AND LIMITATIONS OF JUDICIAL TASKS

Two of the key structural features of the civil justice system that bear on the cost and efficiency of civil disputing have just been examined: the process (adversarial adjudication) and the institution (the courts). As much as one would like to think that a civil justice system can be organized so that there is a complete congruence between the two, experience teaches otherwise. Not all civil adjudication takes place in courts; and courts often are asked to manage decisionmaking processes other than adjudication. Once one accepts the inevitability of this lack of congruence and begins to consider the great variety of decisionmaking tasks that are routinely assigned to the judiciary two of the most important sources of the courts' workload become clearer: legislative overuse of courts to perform relatively straightforward adjudicative tasks; and the assignment of complex and time-consuming non-adjudicative and managerial tasks to courts.

The former has already been noted. Consideration of the latter raises the question whether inherent in the regular judicial process are functional limitations on the kinds of tasks that should be handled by courts. Are there, in fact, certain kinds of disputes that are simply not well suited for judicial adjudication? Two possible types of limitations merit discussion: do some kinds of civil disputes have structural features that unduly tax the judicial system? and are there some substantive outcomes that courts are not well suited to producing?

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<sup>65</sup> Once again Owen Fiss has been among the most powerful exponents of the symbolic virtues of adjudication. See O. Fiss, "The Social and Political Foundations of Adjudication" (1982) 6 *Law and Human Behaviour* 121.

The structural problem is pervasive. Some commentators have argued that where the conflict between two or more parties is polycentric the judicial process is inapt.<sup>66</sup> Take the example of trying to divide the assets of an estate into equal lots to be distributed among heirs. It may be that certain heirlooms are worth more when kept together than if divided up; but it may be that some of the heirs in question have a sentimental attachment to these heirlooms and desire their division. How can a judge decide as between the claim of one heir seeking to maximize the value of the estate, and therefore wishing to have the heirlooms kept together, and the claim of other heirs seeking to share the heirlooms? Absent some preliminary clarification of the value of the assets of the estate, considered as a whole and considered in various possible combinations, it is difficult to imagine how a court could adjudicate this claim. Even then, it may be that the heirs themselves assign incommensurable weightings to different asset combinations. In other words, in this situation the decisionmaker must take into account factors to which no yes-or-no answer can be given independently of the yes-or-no answer given contemporaneously in respect of several other questions.

Similar types of difficulties arise whenever allocative decisions are in issue. These types of problems have historically been most present whenever legislatures required courts to regulate certain sectors of the economy. A large literature on the economics of regulation suggests the inefficiency of regulating markets. What is less noticed is the difficulty of deploying adjudication to undertake or to supervise that regulation.<sup>67</sup> In more recent years the problems of courts undertaking allocative tasks has spilled over into non-economic domains. Take the example of a court trying to decide whether the behaviour of a corporation contravenes an anti-discrimination statute, and if so what to do. The decision that a certain pattern of employment or remuneration practices can only be redressed through the imposition of future hiring quotas or *ex post facto* salary increases has a range of implications throughout the business in question. Determining the conditions under which the quota should apply, and trying to trace the impact of achieving salary equity on the size of the workforce and future wage-scales are not tasks to which the ordinary judicial process easily lends itself. Without a preliminary structuring of a range of potential alternative courses of action and their cost it is almost impossible for a court to decide how to proceed.

A number of constraints also flow from the substantive outcome that courts are frequently asked to achieve. Much of the contemporary legal regulation that

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<sup>66</sup> See M.A. Eisenberg, "Participation, Responsiveness and the Adjudicative Process: An Essay for Lon Fuller" (1978) 92 *Harvard Law Review* 410.

<sup>67</sup> See, for a discussion of the problem, L. Fuller, "Irrigation and Tyranny" (1965) 17 *Stanford Law Review* 1021.

generates the greatest volume of ostensible conflict results either from attempts to rebalance contracts by *ex post facto* judicial intervention or from attempts to undertake social welfare policy through the vehicle of rules of duty and entitlement.<sup>68</sup> Among the most obvious instances of the former are attempts to equalize contractual bargaining power in connection with the sale of consumer goods or the provision of consumer services, with the provision of residential rental accommodation, and with the regulation of non-union contracts of employment. It is one thing to require sellers to provide identified product warranties, to require landlords to meet minimum standards of safety and salubrity, and to require employers to provide minimum wage, vacation, pension and injury compensation entitlements. However wise or unwise the substantive policy being pursued, *ex ante* standards that can be adjudicated are identified.

Where, by contrast, the judicial task involves assessing *ex post facto* whether an agreement is unconscionable, whether it has become lesionary as a result of changed circumstances, whether reasonable notice has been given of a consumer default, and so on, adjudication becomes more difficult. A like equitable rebalancing can be seen in the movement of the law of torts from a set out rules concerned with retribution (or the paying of compensatory damages) towards a set of rules concerned with redistribution and social insurance (or the spreading of losses to deep-pocket defendants). In other words, the more the legal rule in question departs from a logic of corrective justice, the less the judicial process is an economically efficient dispute-resolution process.

The above should not be taken as a plea for a return to a regime of unrestricted freedom of contract or fault-based compensation in tort just so that these types of civil disputes can be resolved efficiently by courts. Polycentric, allocative and redistributive considerations affect all legal fields. The point is, rather, simply to note that regulation of contract through *ex post facto* third-party oversight or non-compensatory tort schemes generate litigation because the relevant standard has no particular content in the absence of a specific factual situation. The real question is whether these entitlements can be formulated in a manner that will encourage (or even enable) parties and their counsel to settle the dispute prior to litigation.<sup>69</sup> One need only think of alternatives to after-the-fact judicial decisions such as legislatively imposed standard form contracts, or

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<sup>68</sup> The best contemporary discussion of this theme from a substantive perspective can be found in the essays collected in *Journées René Savatier: l'évolution contemporaine du droit des contrats* (Paris: Presses Universitaires de France, 1985).

<sup>69</sup> See R. Posner, "An Economic Approach to Legal Procedure and Judicial Administration" (1972) 2 *Journal of Legal Studies* 399. But compare, on the dangers of judicial over-involvement in the settlement process, M. Galanter, "The Emergence of the Judge As Mediator in Civil Cases" (1986) 69 *Judicature* 256.



general principles of law that promote substance over form in order to appreciate how the legislature can achieve the same public policy goal without stimulating litigation. Once the idea of “absolute freedom of contract” is put into question there is no need for fairness to await an after-the-fact judicial confirmation.

The idea that certain types of legislative policy objectives can best be pursued otherwise than by assigning justiciable rights that can only be specified after litigation has many potential applications. Imagine the different possible approaches to the standard dependant’s relief situation. At one extreme one could hypothesize a court-intensive procedure. The statute governing testate and intestate succession could require that a *post-mortem* claim by a spouse or dependent children be brought to a court for determination. The statute could also provide that relief will be awarded on a case-by-case basis according to a long list of “factors deemed relevant”. In such cases, not only must the claim be brought to court, but it is more difficult for parties and their lawyers to predict how the range of factors will be interpreted and applied in each case. The greater the number of subjective factors to be considered, and the greater the scope given to “moral” considerations such as the behaviour of the applicant towards the deceased, the more parties will advance and contest evidentiary claims, and the more likely the particular configuration of these factors in any given case will be influenced by the perspectives of the decisionmaker in question.

At the other extreme one could imagine a completely non-judicialized process. The dependents’ relief statute could provide simply that, for example, one-half of all the assets of the deceased person (typically a spouse or a parent) would be payable to the other spouse and children, or would be held in trust for their benefit. In other words, here a bright-line rule narrows the civil dispute to a contest over the contents and the value of the estate. All other issues are eliminated. And because descriptions of things or economic values are both more transparent and more easily generalized than descriptions of attitudes and intentions, the potential for precedent-based settlement of future litigation is enhanced. Depending on the chosen formulation, the amount of litigation produced will vary significantly; depending on the chosen formulation, the number and kinds of issues the court will have to hear and determine will vary; and depending on the chosen formulation, the number of court days devoted to each case and the cost of processing the dispute will vary.<sup>70</sup>

In the examples just given it is important to note that it is primarily the nature of the task assigned to the court, and not the precision or the imprecision

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<sup>70</sup> This discussion ignores, of course, problems of over- and under-inclusiveness of “bright-line” rules. It also presumes that the specific content of the “bright-line” rule is of no great moment to the litigants. See, generally, D. Jacoby, “Doit-on légiférer par généralités ou doit-on tout dire?” (1983) 13 *Revue de droit de l'Université de Sherbrooke* 255.

of the legislative rule itself, that is the engine of litigation. This insight is exactly what motivated the inclusion within the Ontario *Personal Property Security Act* “of a substance of the transaction” rule and what induced the Courts of Equity to develop the “once a mortgage, always a mortgage” principle. If the legislature drafts statutes to prevent hyper-refined “form over substance” contractual techniques from generating substantively different legal outcomes, such techniques will not require courts constantly to have to adjudge the exact consequences of their deployment in constantly changing circumstances.<sup>71</sup>

The lessons of the previous paragraphs should not be overstated. Any limitations on the kinds of tasks that courts can handle efficiently do not imply similar limitations on the capacity or legitimacy of the legislature addressing substantive questions. Neither do these limitations mean that legislatures cannot recast the statutory response to a problem in such a way as to enhance the efficiency of adjudication. No human problems present themselves as inherently suitable or not suitable for adjudication; legislative decisions about their formulation have this consequence. Finally, simply because the kinds of tasks that courts can handle efficiently are limited does not mean that legislatures should be prohibited from assigning to them tasks that do not meet the test of efficiency. The lessons of this discussion are, by contrast, only that the judicial process imposes constraints on the way in which problems can be framed for efficient adjudicative decision and that sometimes a statutory formulation imposes substantial costs on parties in order to present civil disputes in a form easily digestible by the courts. And these lessons suggest that much legislative attention ought to be devoted to the conditions under which the predigestion of civil disputes to enhance adjudicative efficiency should be pursued.

## 19. THE NATURE AND SCOPE OF JUDICIAL REMEDIES

Some of the structural limitations of the judicial process that lead to cost and delay in the civil dispute system can thus be overcome by recasting the way entitlements are formulated. Can a similar solution be applied to limitations on the types of remedies that courts are empowered to offer? If the purpose of litigation is to resolve once and for all a particular civil dispute, regardless of how well that resolution actually solves the underlying social or interpersonal conflict that gave rise to the dispute, it is easy to deduce the optimal judicial remedy. Ideally a judicial decision should lead to an immediately executory order. It should amount, for example, to a declaration that one party should pay

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<sup>71</sup> For a detailed consideration of this point see R.A. Macdonald, “Faut-il s’assurer qu’on appelle un chat un chat? Observations sur la méthodologie législative à travers l’énumération limitative des sûretés, ‘la présomption d’hypothèque’ et le principe de ‘l’essence de l’opération’” in E. Caparros, ed., *Mélanges Germain Brière* (Montreal: Wilson et Lafleur, 1993) at 527.

damages to another, or that a contract should be specifically performed, or that a divorce is granted, or that title to property is transferred, and so on.

The central characteristic of these types of remedy is that they are one-off, instantaneous decisions which do not require the court itself to take any further steps to ensure the execution of the judgment. To take the simplest case, if the defendant does not pay the money owed, the plaintiff may have the sheriff seize and sell the defendant's assets to satisfy the judgment. Again, once the judgment orders a defendant to convey title and possession to the plaintiff, should the defendant refuse, the plaintiff may have the sheriff take possession of and deliver up the property. Finally, once a judgment of divorce is pronounced (and assuming that the marriage produced no children and that the former spouses make no claim for support against each other) the parties are free to live their lives as if they had never been married. In all these cases, whether the judgment actually solves the human conflict giving rise to the lawsuit, it ends the civil dispute. No further act or decision either by the court or by the parties is necessary in order for the judgment to produce its effects.

But many orders now being asked of courts by plaintiffs, and many remedial possibilities now being handed to courts by the legislature require ongoing third-party supervision. Every alimony or maintenance award is infinitely revisable: until death of one or the other spouse or until children reach the age of majority, the case is never closed. Similarly, many requests for structured settlements in ordinary tort litigation—that is, awards of damages to be paid not in a lump sum, but periodically—demand that a court official supervise their ongoing administration. Where an order is made for specific performance of a contract that involves an ongoing relationship, such as the maintenance of a franchising agreement, the court is never off the hook (is never *functus officio*) until the contracted for performance entirely occurs. An analogous supervisory role is engaged whenever courts grant injunctive relief—especially in connection with injunctions to perform some ongoing service, or to refrain from so doing.

The example of the injunction suggests a further dimension to the issue. While Courts of Equity developed the prohibitive injunction several centuries ago, in the past half-century it is the mandatory injunction in non-contractual settings that has provided courts with the most difficult situations of ongoing supervision. In large part this has occurred because the legislature is not reluctant to delegate to courts broad authority to restructure public institutions. The experience in the United States with civil rights injunctions—where courts make orders that actually require legislatures to spend money to perform certain services (school bussing, for example), or to provide certain facilities (build more prisons, for example)—indicates just how much our understanding of the kinds



of remedies that are appropriate to civil disputing has changed in recent decades.<sup>72</sup>

But it is not just in high profile public law fields that the character of legislative expectations of judicial remedies is changing. The class action and other devices require the court to become involved in a variety of supervisory functions: the design of the class, the structuring of a remedy and the disbursement of post-judgment entitlements.<sup>73</sup> Here the legislature actively co-opts the judiciary into the administration not only of the "Common law", its historic task, but also into the administration of particular remedies.<sup>74</sup> Nowhere is the transformation of the remedial role of courts more evident than in connection with mass tort litigation involving, for example, asbestos, the Dalkon shield, DES, Agent Orange and silicone breast implants.<sup>75</sup>

It is hardly surprising, given the remedial opportunities which modern legislation authorizes and which modern litigation presents, that courts are often faced with deciding difficult policy issues that do not fit well with the model of classical adjudication. Once again, these examples are not meant to suggest that such complex remedies should be eschewed by the legislature, or that courts should never temper the assumptions of adversarial adjudication in order to fashion an appropriate remedy. The history of the Common law could be (and has been) written around the development and expansion of judicial remedies.<sup>76</sup> But it may be that the judicial process in its current organization is not the ideal forum for managing these novel remedies. In the criminal justice system, whenever the court sentences a guilty party to some sanction other than fine or imprisonment—conditional discharge, probation, diversion through community

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<sup>72</sup> For a thoughtful elaboration of these changes, see O. Fiss, "The Supreme Court 1978 Term — Forward: The Forms of Justice" (1979) 93 *Harvard Law Review* 1; see also, O. Fiss, "Coda" (1988) 38 *University of Toronto Law Journal* 288.

<sup>73</sup> See generally, A. Prujiner and J. Roy, ed., *Les recours collectifs en Ontario et au Québec: Actes de la première conférence Yves Pratte: Class Actions in Ontario and Quebec*, (Montreal: Wilson and Lafleur, 1992).

<sup>74</sup> See J. Resnick, "Managerial Judges" (1982) 96 *Harvard Law Review* 374, and "Whose Judgment: Vacating Judgments, Preferences for Settlement and the Role of Adjudication At the Close of the Twentieth Century" (1994) 41 *UCLA Law Review* 1471.

<sup>75</sup> The civil justice implications of these cases are discussed in D. Hensler, et al., "Understanding Mass Personal Injury Litigation: A Socio-legal Analysis" (1993) 59 *Brooklyn Law Review* 961.

<sup>76</sup> See for example, J. H. Baker, *An Introduction to English Legal History*, 2d ed. (London: Butterworths, 1979), Part One.

service, and so on—there already exist outside the judicial process various agencies that have the responsibility for monitoring the fulfilment the sentence.

On the civil justice side these follow-up institutions are much rarer. Of course, the need to follow-up on the execution or performance of civil judgments is one of the reasons why legislatures choose to create multi-functional administrative agencies such as labour boards, labour standards offices, and municipal and zoning commissions. In such cases, policymakers have recognized that the success of a particular dispute-settlement process demands effective public enforcement. There are, however, few such administrative adjuncts to the ordinary judicial process. What is more, those systems that now do exist (such as that which ensures the collection of judgments for alimony and maintenance) do not relieve courts from the ultimate responsibility for monitoring the continued appropriateness of the order rendered.

This might suggest that the need to provide for ongoing supervisory remedial powers could be seen as an indication that the dispute itself should be handled elsewhere than in the judicial process. In other words, it might suggest a return to an earlier logic of civil justice where remedies control rights, rather than the reverse—with one important difference however. No longer would remedies themselves be limited by preconceptions about the appropriate scope of judicial adjudication. On the other hand, were the legislature to conclude that the court is the optimal institution for deciding those types of civil dispute necessarily giving rise to remedies requiring ongoing supervision, it suggests the creation of other complementary institutions of civil justice either to relieve the courts of the burden of ongoing monitoring of their orders, or to reduce the cost to litigants of ensuring their enforcement.

## 20. MEDIATING THE *STARE DECISIS* AND *RES JUDICATA* FUNCTIONS IN JUDICIAL DECISION-MAKING

The discussion to this point has more or less taken for granted that the choice confronting the legislature in working through the issue of what types of disputes to assign to the judicial process is only a choice between the courts and other public decision-making bodies. But as the introductory paragraphs to this section point out, the true range of options open to the Parliament of Ontario is much broader: it may decide to allocate certain disputes to private or semi-private decisionmakers such as consensual arbitrators. This possibility raises a further aspect of the process of judicial adjudication that the legislature ought to have in view when deciding these questions. Are there inherent features of adjudication that require it to be undertaken only by public officials?

The preceding consideration of the formal, substantive and remedial features of ordinary judicial adjudication suggests a negative answer. To begin, there is nothing about the mechanics of adjudication that requires the process to be undertaken only by civil courts. Moreover, there are few structural features of and political values nourished by the current judicial system—for example, openness, accountability, and neutrality of judges—that are also not present in administrative tribunals. And with the proper attention to questions of institutional design, all of these can be replicated by private decision-makers. In principle, therefore, the legislature could entirely privatize the civil justice system by simply enacting certain due process rules similar to those set out in the *Courts of Justice Act* and the Rules of Practice to govern private decisionmaking. That is, it is possible to conceive a role for the public judiciary that is as limited as the “night-watchman” role that certain political theorists assign to the State in general.<sup>77</sup>

Fundamental symbolic reasons, however, can be advanced for maintaining a public judicial system, however limited the role one assigns to it.<sup>78</sup> There are also two pragmatic reasons that might argue against total privatization. First of all, it can be argued that resolving civil disputes is a governmental function of the same type as maintaining peace with a police force. It should, therefore, be free (that is, a charge on the public purse). The weight and scope of this argument will be discussed in the next section of this Study Paper.

But there is a second argument for maintaining the judicial system that touches more directly issues of present concern. In the Common law tradition, judicial decision-making has a recognized law-making function: cases not only decide disputes between private parties (their *res judicata* function); cases set new precedents which then become law for all citizens (their *stare decisis* function). And it is this latter function that permits disputants in the future to predict litigation outcomes, thereby avoiding the expense and aggravation of a lawsuit.<sup>79</sup> The bivalent nature of civil dispute resolution, that is, the function of civil courts as a surrogate for the legislature, is said to require that civil disputes should always be processed by adjudicative bodies whose decisions are public,

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<sup>77</sup> Surprisingly, however, even in the most minimal accounts of the role of the State, public courts retain a significant role. See, for example, R. Nozick, *Anarchy, State and Utopia*, (New York: Basic Books, 1974).

<sup>78</sup> Compare, O. Fiss, “The Social and Political Foundations of Adjudication” (1982) 6 *Law and Human Behaviour* 121, with M. Landes and R. Posner, “Adjudication As A Private Good” (1979) 8 *Journal of Legal Studies* 235.

<sup>79</sup> The classical citation is H. Mnookin and L. Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 *Yale Law Journal* 950.



publicized and accessible. We restrict private law-making by enacted rules; we ought, therefore, to restrict private law-making by decisional rule.<sup>80</sup>

Yet this is a tenuous argument. It presupposes a sharp distinction between the public and official processes of lawmaking and law-application and non-public and non-official processes of norm-generation and norm-application. Whether or not the most adequate explanation of the relationship between official and unofficial law lies in a theory about the difference between "the law in books and the law in action" or whether it lies in some notion of legal pluralism, non-official law abounds in modern polyethnic societies like Ontario.<sup>81</sup>

Most obviously, private law-making by enacted rule is extensive. Corporation by-laws, rules and regulations of marketing agencies, trade associations, social clubs, universities, churches and countless other private institutions are all examples of private legislation. The vast bulk of these rules, moreover, are obligatory and cannot be avoided by the constituency to which they are intended to apply. The vast bulk, finally, are not subject to extensive public pre-enactment due process requirements, nor to broad post enactment judicial review as to their substance.

Private law-making can occur by contract. As Civil Codes so clearly state: a contract serves as the law of the parties. But it is not just through private contracts between two parties that this form of rulemaking takes place. Collective agreements, as well as franchising and multi-party partnership agreements have a legislative character that resembles that of a statute.

Given the extensive degree of private law-making, the argument against private dispute-settlement flowing from the *stare decisis* function of judicial decisionmaking is that much less persuasive. Even in some of the most important civil cases the public function of judicial adjudication is not its central feature. Many, many cases are settled long before trial. Moreover, many cases are settled during trial before judgment. Especially in insurance matters, still more cases are negotiated on the understanding that the settlement will remain private.

Those who argue that the public *stare decisis* function of adjudication requires that all civil disputes be decided by courts, cannot account for society's

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<sup>80</sup> See the discussion in J. Fisch, "Rewriting History: The Propriety of Eradicating Prior Decisional Law through Settlement and Vacatur" (1991) 76 *Cornell Law Review* 589.

<sup>81</sup> On the legal pluralist explanation of normative diversity see J. Griffiths, "What is Legal Pluralism?" (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1, and M. Galanter, "Justice in Many Roms: Courts, Private Ordering and Indigenous Law" (1981) 19 *Journal of Legal Pluralism* 1.

tolerance of private (and even confidential) settlement of lawsuits. Indeed, in many fields there is much private knowledge about the parameters of settlements, and these patterns of settlement serve as a kind of customary rule of legal practice.<sup>82</sup> Apart from matters dealing with the status of persons—paternity, adoption, marriage, divorce—few civil disputes actually require the judgment of a court for their solution. If one is prepared to countenance private settlement by parties to official litigation, the argument about private settlement of disputes by third parties is much less persuasive.

Once it is accepted that the *stare decisis* function of judicial adjudication is not its defining feature, then there should be no blanket reason to prevent consensual arbitrations, even when arbitrators are bound by a confidentiality agreement. Again, there should be no blanket reason why a logic of publicity should apply to non-judicial arbitrations which are statutorily imposed, or *a fortiori* to statutorily mandated mediations. This is not to say that all types of civil dispute should be permitted to remain confidential. Rather the argument is that the reasons for openness are tied to issues such as governmental accountability, to empirical arguments about how to measure just outcomes, and to the need for periodic systemic evaluation, and not to the *stare decisis* function of civil litigation.<sup>83</sup> These questions will be reconsidered in the Second Part of this Study.

The effective operation of the *stare decisis* principle is thought by some commentators to be an important determinant of rates of litigation. The basic claim is that a stricter rule of *stare decisis* will reduce litigation. If courts are strictly bound by previous decisions of appellate courts it is thought that this will enhance the predictability of outcomes and therefore minimize speculative litigation. This is analogous to the argument that greater precision in statutory drafting will reduce litigation and suffers from the same flaws. First of all, as noted in connection with the discussion of legislative precision, all legal rules have essentially a hypothetical character. A legal rule derived by the application of the *stare decisis* principle does not automatically solve disputes any more than

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<sup>82</sup> See L. Robel, "The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals" (1989) 87 *Michigan Law Review* 940.

<sup>83</sup> The most comprehensive discussion of these factors is provided by M. Galanter and M. Cahill, "'Most Cases Settle': Judicial Promotion and Regulation of Settlements" (1994) 46 *Stanford Law Review* 1339.

does a legislative rule; it merely indicates how disputes must be formulated to fall within its purview.<sup>84</sup>

Secondly, again as noted in connection with the discussion of legislative precision, the primary determinant of litigation (in those cases where litigation is not being undertaken for strategic reasons) is the ability of the bar to replicate the reasoning of the courts and to apply that reasoning to their clients' situations.<sup>85</sup> Replicability can be facilitated either by specialization within the Bar or by its homogeneity. A specialized commercial bar will certainly make the litigation of commercial disputes more efficient by superimposing on the dispute its own customary practices and understandings. As for homogeneity, the case of England is instructive. A small, relatively homogeneous bar takes proportionally fewer cases to litigation because there is tacit agreement among barristers as to what should be litigated and what should be settled.

The less specialized and the more democratized the litigation bar, however, the greater the chance of litigation to contest received understandings of the law. In addition, a more democratized bar (which a number of studies of the legal profession suggest is a good thing for the health of the legal system), means a greater diversity of loyalties among experts, and means that more issues of the nature of substantive rationality (that is, issues framed so as to raise questions about the correctness of a legal rule and not just about its meaning) are brought for judicial resolution.<sup>86</sup>

Typically, a more democratized Bar is also evidence of a less deferential society where courts as much as the political process are used to contest existing distributions of social power. In such a context civil litigation serves principally an anti-*stare decisis* function. The civil litigation process becomes expressly used to change, not to confirm, the law. In such a context, then, a stricter rule of *stare decisis* will only produce more indirect techniques for distinguishing precedents—it will not eliminate the motivation of civil disputants for seeking to overcome past precedents. Nor will it foreclose the judiciary from acquiescing in the effort when the perceived need to do so is compelling.

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<sup>84</sup> Some commentators doubt whether it is even possible to formulate a coherent theory of binding precedent. See H.P. Glenn, "Sur l'impossibilité d'un principe de *stare decisis*" (1993-94) 18 *Revue de la recherche juridique: droit prospectif* 1072.

<sup>85</sup> For a discussion of the notion of replicability of reasoning, see M.A. Eisenberg, *The Nature of the Common Law* (Cambridge: Harvard University Press, 1987).

<sup>86</sup> See, generally, on the argument for professional diversification, R. Abel, *American Lawyers* (New York: Oxford University Press, 1989), at 14-40.



## 21. THE ROLE OF THE LEGAL PROFESSION IN THE JUDICIAL PROCESS

This last point leads directly to a consideration of the role of lawyers and the Law Society of Upper Canada in influencing the amount of litigation, and the cost and efficiency of the civil justice system in Ontario. After all, by the way in which they frame litigation, lawyers share primary responsibility for translating the judgments of courts into precedents. By their ability to negotiate between themselves (in the reflection of the law) a just settlement of their respective clients' claims, lawyers can significantly reduce the number of lawsuits brought on for trial. And by their manner of conducting of civil litigation, lawyers have significant control over the timing and the length of trials.

The promise of professionalism generally is one of expertise and efficiency. It has various manifestations in connection with civil litigation. Because modern law is so complex and voluminous, without an experienced lawyer as a guide, civil justice is unattainable. Any social costs of a professional monopoly are thus said to be counterbalanced by efficiency gains and the expertise which monopolies generate. But like most other "obvious points" in this field, however true they may be, these are empirically untested claims. Indeed, there is evidence to the contrary. Professional monopolies tend to overdeploy the resource over whose exploitation they have been given the monopoly.<sup>87</sup>

While it goes well beyond the scope of the Civil Justice Review to examine how the present practice of law (including questions of firm size, remuneration, legal aid, canons of ethics, and so on) bear on rates of litigation, there are those who argue that without a close examination of legal practice few efficiency gains in civil litigation are likely to result. A reflexive commitment to professionalism prevents analysis of basic questions about the current structure of civil disputing in Ontario. Among the more obvious of these basic questions are the following. How, if at all, does the existence of a professional monopoly bear on the development of alternative forms and processes for resolving disputes, in respect of which no monopoly may be claimed? And, given that judges are exclusively drawn from the membership of the Law Society, to what extent can it be said that the main purpose of current rules of judicial jurisdiction, evidence and procedure is to make the process of civil litigation easier for judges and public officials to manage?

Of course, there is no easy answer to either of the above questions. Take the issue of professional monopolies. There is some evidence about the impact of permitting other persons besides lawyers to represent clients before courts, but

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<sup>87</sup> See the discussion in L. Friedman, "Lawyers in Cross-Cultural Perspective" in R. Abel and P. Lewis, eds., *Lawyers in Society: Comparative Theories* (Berkeley: University of California Press, 1989), 1 at 11.

it is far from conclusive. No-one even knows what effect permitting different sectors of the profession to form their own sub-profession would have on the rate and character of civil litigation. But one can speculate that if different types of lawyers were required to compete for different types of client business, and were permitted to develop alternative institutional responses and remedial alternatives to present to clients, a pluralisation of civil dispute systems would likely result. Put slightly differently, if alternative dispute resolution and the pluralisation of institutions and processes of civil disputing may be a healthy stimulus to economy and efficiency in the civil justice system, would not the same be true in respect of the delivery of legal services?<sup>88</sup>

The possibility of pluralising the legal profession itself leads to consideration of whether greater use of para-legals and legal technicians might improve the civil justice system in Ontario.<sup>89</sup> Even more generally, were legal information more broadly disseminated, and were public legal education actively pursued, a wide diversity of institutions and processes of civil disputing might develop. Yet various studies have shown these strategies for seeking greater efficiency in the civil justice system to be two-edged. The lowest common denominator of much para-legal work tends to be agency representation for provincial offenses and other minor matters. That is, independent para-legals are no guarantee that alternatives to litigation will be actively pursued.

Similarly, the lowest common denominator of much public legal education is "know your rights" literature, which if anything prematurely sharpens interpersonal conflict into pseudo-legal disputes. In the absence of a more general rethinking of the kind of advocacy that is promoted within the legal profession, it is unlikely that broadening the scope for para-legal activity, or enhancing public legal education and information will have much bearing on the nature and rates of civil litigation.<sup>90</sup>

As for the second question, it is worth asking who benefits most from the current design of the civil justice system. Many long-standing principles connected with civil disputing processes—cost-shifting rules, civil juries,

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<sup>88</sup> There is evidence from Quebec, which has two legal professions one of which is excluded from representing clients in courts, that competing monopolies stimulate a pluralization of dispute settlement institutions. See R. A. Macdonald, "Images du notariat et imagination du notaire" (1994) 1 *Cours de perfectionnement du notariat* 1.

<sup>89</sup> For a recent study, see R.W. Ianni, *Task Force on Paralegals* (Toronto: Ministry of the Attorney General, 1990).

<sup>90</sup> On the double-edged sword of enhanced public legal information, see R.A. Macdonald, "Access to Justice and Law Reform" (1991) 10 *Windsor Yearbook of Access to Justice* 287, at 332-335.

prohibitions on barratry and champerty, court filing fees, rules restricting the availability of contingency fee arrangements—presuppose a model of the judicial system that while historically accurate, bears little resemblance to the civil justice system in late 20th century Ontario. Even modern developments designed with systemic goals in mind—legal aid, small claims courts, class actions—maintain a model of the trial process and its various stages that takes no account of, among other things “non-Hohfeldian” or ideological plaintiffs, institutional and strategic litigation, process externalities, and other features of what has been called the “sociology” of the case.<sup>91</sup> A legitimate preoccupation with the merits of individual cases—itself an inescapable consequence of professional representation in an adversarial adjudicative process, has become a fetish that blinds the civil justice process to its perverse incentives when examined as a system.

Evidence in Quebec indicates that the present internal processes of civil litigation work mainly to the convenience of lawyers and judges, rather than to the interests of litigants. This evidence does not indicate that the civil litigation process is unjust; only that many of its detailed rules would not be those proposed by a “time and energy” consultant, or by litigants themselves. An example drawn from the Small Claims Court—where no lawyers are, as a rule, permitted to represent clients, where until this year no corporations could be plaintiffs, and where the judges are full-time judges of the Quebec Court-Civil Division serving on a rota basis—is illustrative. It appears that many judges dislike sitting in Small Claims Court because the cases become factually quite messy and confused. Moreover, the challenging legal puzzles presented by a well-prepared advocate are certainly easier to manage than cases pleaded without the assistance of counsel, or cases where considerations of equity are central.<sup>92</sup> This suggests that lawyers are essential to the efficient management of the civil justice system in Ontario and elsewhere primarily because they can present a civil dispute in a manner already predigested for adjudication. Expeditionary justice is, from this perspective, the efficient production by legal professionals of cases to be heard and disposed of at trial.

Once it is accepted that certain civil disputes may be allocated to institutions other than courts, and that the process by which they are formulated, argued about and decided need not necessarily be one of adversarial adjudication, the current expertise of the legal profession becomes a central concern for those who would reform the civil justice system. Assuming that the Law Society retains at least a partial monopoly on the delivery of legal services, and that lawyers will

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<sup>91</sup> See D. Black, *Sociological Justice* (Toronto: Oxford University Press, 1991).

<sup>92</sup> See S.C. McGuire and R.A. Macdonald, “Wizards of Oz: Judicial Scripts in the Dramaturgy of the Small Claims Court”, (forthcoming, (1995) 10 *Canadian Journal of Law and Society*).



therefore be key players in all these other institutions and processes, the question is whether lawyers currently have the training and skills to manage these alternative processes effectively and efficiently? If not, in the absence of professionals able to internalize the logic of these other institutions and processes, they risk simply becoming as judicialized as the court process they were thought to replace. This, after all, has been the experience in many of those administrative tribunals initially created to dejudicialize processes of dispute-resolution.

It follows that a recasting of civil disputes so as to change the nature and rate of civil litigation probably requires a certain recasting of the legal profession, and concomitantly a recasting of legal education. Already, the Ontario legal profession is in the throws of a major transformation. This is reflected in the following phenomena. The internationalization of economies has produced a restructuring of large corporate-commercial firms. Increased supervision of legal activity by in-house counsel has affected billing practices. The declining weight of the litigation bar in the governance of the profession directs attention to non-élite practice. And economic hardship is expressed in continuing concern about the over-production of lawyers by law faculties.

A similar transformation is affecting the legal education establishment, as the clientele for legal education, the curriculum, and the subject-matter, objectives and methods of legal scholarship are changing.<sup>93</sup> This being said, however, it should not be presumed that any of these changes or transformations will have a salutary impact on problems of cost, delay and accessibility within the civil justice system. For Ontario will derive the full benefit from non-adjudicative and non-judicial processes of civil dispute resolution only when there are also legal or other professionals competent to deploy these alternatives efficiently. Civil justice is not just a static system of rules and offices. It is a process. And processes require people adept at exploiting them in order for them to fully to achieve their promise.

## 22. MATCHING INSTITUTION, PROCESS AND PROBLEM IN THE CIVIL JUSTICE SYSTEM

The different points raised in this section suggest that one of the major problems of civil justice in Ontario today relates to our expectations of what courts and the judicial process should accomplish. By extension, the observations about adversarial adjudication and its varieties, about the diversity of judicial institutions, about the legal character of contemporary civil disputes, about the

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<sup>93</sup> Not as much as one would have predicted, however. See H.W. Arthurs, *Law and Learning* (Ottawa: Social Sciences and Humanities Research Council, 1983).

kinds of remedies within the gift of courts, and about the role of the legal profession in civil litigation could be equally made about every other dispute settlement body.<sup>94</sup> Asking and answering these questions is, in fact, a major preoccupation of administrative law scholars.<sup>95</sup>

Yet there is something noteworthy about modern expectations of courts. Most significantly, courts are no longer seen only as adjudicators of private disputes. For better or worse, recent legislation has converted them into mini-political arbiters. Is it possible, in an era of charters of rights, human rights codes, and family law acts which require complex balancing of political issues on the basis of incomplete evidence and not very well-crafted guidelines, for the court system to continue to function simply as an adjudicative body? Not only have legislatures cast courts explicitly and increasingly into this political role (a role, of course, that they always played implicitly, secondarily and interstitially), they have done so on the basis of questionable assumptions about the courts' capacity to fulfil these new functions.<sup>96</sup>

This observation has profound implications. If the social function of the judicial process is changing, it may be necessary to change not only rules of jurisdiction, evidence and procedure, and to reassess the relationship between courts and other institutions established the new orders and remedies they are authorized to grant, but it may also be necessary to rethink civil justice at a more fundamental level. Who do we appoint as judges, and how do we appoint them?<sup>97</sup> To what extent does a changing logic of litigation demand a changing logic of the judicial office and its incumbents—either by deprofessionalizing the judiciary, or electing magistrates?

A complementary inquiry involves matters more of direct concern to the Civil Justice Review. If legislatures wish to deploy courts as instruments of social policy, might this not argue that the Ontario Court (General Division)

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<sup>94</sup> In the language of proponents of alternatives to courts, this is the endeavour of "letting the forum fit the fuss". See F. Sander, et al., *Dispute Resolution* (Toronto: Little, Brown, 1985).

<sup>95</sup> For a survey of the literature, see R. Howse, R. Prichard and M. Trebilcock, "Smaller or Smarter Government?" (1988) 40 *University of Toronto Law Journal* 498, and J. Frug, "Administrative Democracy" (1988) 40 *University of Toronto Law Journal* 559.

<sup>96</sup> See the discussion in G. Rosenberg, *The Hollow Hope — Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991), reviewed by P. Shuck, "Public Law Litigation and Social Reform" (1993) 102 *Yale Law Journal* 1763.

<sup>97</sup> For a consideration of these questions, see the Ontario Law Reform Commission Study, *Appointing Judges: Philosophy, Politics and Practice*, (Toronto: Ontario Law Reform Commission, 1991).

should give up its jurisdiction over civil disputes of the ordinary kind, retaining authority only in respect of those litigating these overtly policy-driven cases? This type of reasoning lies behind proposals to create intermediate courts of appeal to handle “ordinary” cases, and policy-developing appeal courts to handle more difficult cases,<sup>98</sup> and *de facto* is deployed by the Supreme Court of Canada in granting leave applications.

If the civil litigation process has in part become a surrogate political process, the root question about matching process, problem and institution of civil disputing is how we can enhance democratic decision-making within other social institutions. Surprisingly few commentators have attempted to evaluate civil disputing in these terms. But it bears asking directly whether we are simply using the courts as alternative public policy institutions because the electoral process puts a premium on satisfying demand by appearing to act but by delegating administrative responsibility elsewhere in the system. Improving the legislative process of municipal councils, school boards, regional government, hospital boards and even the Parliament of Ontario can be predicted to have a major impact on civil litigation. Such an inquiry, however important to the successful pursuit of the mandate of the Civil Justice Review it may be, lies beyond the function of the Task Force.

Nevertheless, if the Civil Justice Review is to make a lasting contribution to improving the civil justice system in Ontario, it must ask not one but a series of questions about matching particular social problems to particular institutional processes: (i) what form of law-making should be adopted in the instant case? (ii) what process of dispute settlement (adjudication, voting or mediation, for example) should be adopted? (iii) need the dispute be argued before a public body or a private body, and in the former case, before a court or other tribunal? (iv) what types of tasks (retributive, redistributive, allocative) does one want to assign to the third-party decision-maker in question? (v) does one want the decisions of the institution in question to serve formally as precedents for future decisions? (vi) what type of remedy does the legislature want the institution to be able to offer? and (vii) what types of professional training will have to be given to the legal profession or the legal professions in order to enable it to make most efficient use of the various alternatives for handling civil disputes. Only after these questions are addressed is it really possible to begin to contemplate how one might go about allocating different types of civil disputes to different

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<sup>98</sup> See, R.A. Macdonald, “Speedy Justice For the Litigant: Sound Jurisprudence for the Province?” (1978) 16 *Osgoode Hall Law Review* 601 commenting on the proposals of the Kelly Commission into the Jurisdiction of the Ontario Court of Appeal; and “Symposium: La réforme de la Cour d’appel” (1990) 31 *Cahiers de droit* 525-585, discussing proposals to create a Supreme Court of Quebec as a second level Court of Appeal.



kinds of bodies, or authorizing these bodies to hear and decide disputes following dispute-resolution procedures other than classical adjudication.

## PART TWO: ALLOCATING CIVIL DISPUTES SO AS TO ENHANCE ACCESS TO JUSTICE

### 23. IMPROVING THE PROCESS OF CIVIL JUSTICE AND ENHANCING ACCESS TO JUSTICE

The mandate of the Ontario Civil Justice Review Task Force is to develop and recommend strategies to produce a more effective, less costly and speedier civil justice system so as to maximize the efficient use of public resources currently committed to civil dispute resolution. But the mandate of the Civil Justice Review in fact covers only a small part of a much larger issue confronting policy-makers in Ontario: this issue, which provides much of the symbolic justification for exercise, is that of enhancing access to civil justice.<sup>99</sup> In other words, apart from its presumed beneficial impact on public spending, an efficient and expeditious civil justice system is sought because of its contribution to making justice more accessible to citizens.

There is, of course, a high degree of overlap between the objectives assigned to the Task Force and the achievement of greater access to justice for the general public. Nevertheless, the two goals are not necessarily congruent. Sometimes, they can actually work to cross-purposes. For example, greater efficiency in the court system may so load up the incentives to litigate that other, more local and more participatory, dispute-settlement institutions are abandoned or whither away. Again, greater accessibility to the judicial system resulting from a reduction of the costs of litigation may actually slow down the system by increasing the number of cases filed. Only if one has already come to the conclusion that the judicial process always produces better substantive justice than any other dispute-resolution system could it be claimed that, whatever the conflict in question, ordinary litigation is a preferred outcome for improving access to justice.<sup>100</sup>

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<sup>99</sup> In 1989 the then Attorney-General of Ontario, Ian Scott, sponsored a conference on Access to Justice, the proceedings of which were published as A.C. Hutchinson, ed., *Access to Civil Justice* (Toronto: Carswell, 1990). The papers delivered at the conference and the reports of the Workshops offer an unusually rich insight into just how much more extensive the concept of access to justice is than simply improving the judicial process.

<sup>100</sup> On the difficulty is identifying and measuring the quality of civil justice, see "Symposium: Assessing the Quality of Dispute Processing" (1989) 66 *Denver University Law Review* 335; M. Galanter and M. Cahill, "'Most Cases Settle': Judicial Promotion and Regulation of Settlements" (1994) 46 *Stanford Law Review* 1339.

This last observation suggests that the idea of access to justice can be understood in two quite different ways. First, access to justice might be viewed simply as a matter of providing a more access to the civil justice system, where that system is conceived of as comprising uniquely the formal judicial process. Improving the performance and enhancing the accessibility of judicial institutions, in fact, was at the origins of the access to justice movement and it remains an important goal today.<sup>101</sup> Indeed, the mandate of the Interim Task Group of the Ontario Civil Justice Review is centrally directed to a number of such issues that relate to access to justice defined in this way: case-flow management, administrative support, small claims courts, rules of practice, and so on.

But secondly, and more generally, access to justice can be conceived as a matter of providing a more accessible civil justice system, where that system is understood as comprising the whole panoply of public and private institutions and processes by which interpersonal and social conflicts are recognized, negotiated and resolved. Most modern studies of access to justice adopt this second conception—a conception that speaks also to the substance of civil justice—as their organizing frame.<sup>102</sup> Improving access to justice in this second sense is an undertaking that, although not explicitly mentioned, is at least implicit in the tasks assigned to the Fundamental Issues Group.

In order to see where these are complementary ambitions and where they may come into conflict, it is helpful to review briefly the various considerations and policy prescriptions that those who argue the case for improving access to justice have advanced. The first section of this Second Part will, consequently, begin by focusing on the different ways of conceiving access to justice agenda, and the different kinds of legislative response that they call forth. Particular attention will be paid to the notion of alternative dispute resolution as a means for reconciling divergent conceptions of access to justice. This first section then reviews a number of complementary axes for understanding and classifying the events of everyday day for legal purposes. It concludes by speculating on whether classifying human conflict provides any assistance in streaming civil disputes into different institutions or into different conflict-resolution processes.

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<sup>101</sup> See M. Cappelletti, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective" (1978) 27 *Buffalo Law Review* 181. Compare, D.M. Trubek, "Critical Moments in Access to Justice Theory: The Quest for the Empowered Self" in A.C. Hutchinson, ed., *Access to Civil Justice* (Toronto: Carswell, 1990), at 107.

<sup>102</sup> See the report of the Groupe de travail sur l'accessibilité à la justice in Quebec, *Jalons pour une plus grande accessibilité à la justice* (Quebec: Ministère de la justice, 1991); N. Gold, *Access to Justice: The State of Research and a Vision for the Future* (Ottawa: Ministry of Justice, 1990); *Access to Justice: Report of the Justice Reform Committee* (Victoria: Ministry of the Attorney-General, 1988).

The second section of this Part then directly addresses one of the questions specifically mandated to the Fundamental Issues Group of the Civil Justice Review: how to determine the optimal configuration of processes and institutions for managing and resolving civil disputes in Ontario. This second section will review a variety of procedural mechanisms by which the legislature might go about allocating civil disputes to different public and private institutions. It will also suggest safeguards and controls that could be built into any non-judicial dispute-resolution processes that might ultimately be adopted. The section concludes with a brief discussion of how, having put into place these various alternative dispute resolution processes and institutions, the Parliament of Ontario can ensure their effective use by potential litigants.

## **SECTION A. RECOGNIZING AND OVERCOMING BARRIERS TO ACCESS TO JUSTICE**

### **24. OBJECTIVE AND SUBJECTIVE BARRIERS TO ACCESS TO JUSTICE**

To ask whether Ontario has a system of official dispute resolution that is cheap, efficient, expeditious and equally accessible to all citizens is another way of asking, according to many commentators, what are the barriers to access to justice.<sup>103</sup> These barriers are typically grouped into two main categories: objective barriers and subjective barriers. Objective barriers are those relating to factors such as cost, delay, complexity of the system, unintelligibility of legal texts, geographic isolation of certain communities, physical inaccessibility of court houses, lack of adequate translation services, and so on. Subjective barriers are those that are intimately connected to sociocultural background, to the perceptions of citizens, and to their knowledge of their “rights”.<sup>104</sup> A Civil Justice Review having for one of its purposes the enhancing of access to justice must, of course, be sensitive to all the above components of access.

Before the possible approaches that the Civil Justice Review might take to addressing them are considered, however, it is useful to note the effect of characterizing the problem in terms of “overcoming barriers to access”. The metaphor of barrier suggests that justice is a thing, a commodity, which is just out there in the world, ready to be delivered by public institutions such as courts. On this view, just as lack of money to purchase of a television set may be a

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<sup>103</sup> For an explanation of this logic see A. Roman, “Barriers to Access: Including the Excluded” in A.C. Hutchinson, ed., *Access to Civil Justice* (Toronto: Carswell, 1990), at 177.

<sup>104</sup> For an analysis of different objective and subjective barriers, see M. Giard and M. Proulx, *Pour comprendre l'appareil judiciaire québécois* (Sillery: Presses de l'Université Laval, 1985), at 245 et seq.



barrier to access to television, so too lack of money to hire a lawyer or to launch a lawsuit is a barrier to access to justice. Yet study after study suggests that merely enhancing access to dispute-settlement institutions will not, of itself, improve access to justice. However much procedural issues of access are addressed, there is no guarantee that substantive issues of justice will be equally solved.<sup>105</sup>

The very expression access to justice is revealing of the paradox. Presumably, one of (although not the exclusive, nor perhaps even the primary) objectives of political organization is to enhance the conditions for achieving a just society. In this endeavour, the legislature of Ontario has chosen to rely on the vehicle of law. Yet legal entitlements are not always self-executing, with the result that dispute-settlement institutions have been established. In order for them to serve their social function, they must be equally accessible to all citizens. Thus, by a process of double displacement—from justice to law, and from substance to procedure—the political ambition to achieve a just society is transformed into a concern with enhancing access to legal institutions for settling conflict. The rhetorical form of the expression remains one that focuses on justice and on substance, while the content of the expression is directed to questions of law and procedure.<sup>106</sup>

The divergence between form and substance in civil litigation is the subject of a growing sociological literature in the United States that explores the relationship between case characteristics—socio-demographic attributes of and relationship between litigants—and legal outcomes.<sup>107</sup> This literature appears to reveal that many traditional assumptions about neutrality and objectivity in the litigation process are suspect. For example, it seems that “repeat players” are disproportionately successful.<sup>108</sup> Again, it appears that the demographic and ethnographic characteristics of litigants, their relative social status, and their relative degree of organization are all crucial determinants of their success in

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<sup>105</sup> See, for an elaboration of the reasons why this is the case, R. . Macdonald, “Theses on Access to Justice” (1992) 7 *Canadian Journal of Law and Society* 23.

<sup>106</sup> I have explored the nature and effects of this transformation on policy debate in R.A. Macdonald, “Access to Justice and Law Reform” (1991) 10 *Windsor Yearbook of Access to Justice* 287.

<sup>107</sup> For one comprehensive study, see S. Silbey, et al., *Differential Use of Courts by Minority and Non-Minority Populations in New Jersey* (Trenton: State Justice Institute, 1993).

<sup>108</sup> See M. Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9 *Law and Society Review* 95.

court.<sup>109</sup> While U.S. studies cannot automatically be transposed to an Ontario setting, they do raise the question whether justice results simply from making the present civil litigation system more accessible.

There is still another reason why the metaphor of barrier is inapt as a way of thinking about access to justice. The idea of a barrier implies that those who confront it would like to overcome it. Various studies suggest that this is not always the case. As noted, legal recognition of an interpersonal or social conflict transforms that conflict into a somewhat different civil dispute. This transformation is often at the root of inaccessibility. Apparent underuse of courts by certain groups of citizens may have more to do with a rejection of the substance of legal justice and a rejection of the civil litigation process than with any identifiable barriers to access.<sup>110</sup> Again, this is not to say that issues of cost and delay never bear on a citizen's decision not to litigate. It is only to raise other dimensions of the access to justice agenda that argue against making access to courts the only standard against which the quality of the civil justice system is to be measured.

Notwithstanding these concerns, there is a utility to adopting the metaphor of barriers as a means to focus attention on some key problems of access to justice. Four more specific policy issues merit attention.

First of all, it is important to ask whether the principal causes of inaccessibility are what have been called "objective" barriers—cost, delay and complexity? That is, would the provision of judicare (free legal services along a medicare model) and trial on demand (judges available to hear a case the instant the parties are ready to have it heard) overcome the most important barriers to access to justice?

A second policy issue is whether existing procedures of the judicial system are a significant cause of lack of access to justice. That is, will better court administration, case-management, teleconferencing, and so on actually make the adjudicative process more efficient and responsive?

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<sup>109</sup> The major demographic and ethnographic determinants of litigation success are reviewed in D. Black, *Sociological Justice* (Toronto: Oxford University Press, 1991).

<sup>110</sup> See, for example, K. Faith, "Justice Where Art Thou? and Do We Care? Feminist Perspectives on Justice For Women in Canada" [1989] *Journal of Human Justice* 77; M.E. Turpel, "Aboriginal Peoples and the Canadian Charter; Interpretive Monopolies, Cultural Differences" (1989-90) 6 *Canadian Human Rights Yearbook* 3; P.A. Monture-Okanee, "Reclaiming Justice: Aboriginal Women and Justice Initiatives in the 1990s" in *Aboriginal Peoples and the Justice System* (Ottawa: Royal Commission on Aboriginal Peoples, 1993).

Third, it is also worth considering whether the limited public resources devoted to civil justice should be directed to enhancing the use of courts and other public institutions for resolving disputes. That is, should the policy goal be to design a system that efficiently turns all human conflict into a legal dispute, or might resources be better deployed in nurturing more local, less formal, community-managed civil justice institutions?

Fourth, it may be desirable to reallocate expenditures within, or even to spend more money on, aspects of the court system other than those devoted to the resolution of individual cases. That is, should the policy goal be to enhance the status of the courts as the ultimate supervisors of the entire civil justice system—formal litigation, settlements, mediations, private dispute resolution, administrative decisionmakers, and so on, rather than just increase the availability of ordinary court rooms and judges?

## 25. TRADE-OFFS AND PARADOXES IN PROMOTING ENHANCED ACCESS TO JUSTICE

Recent studies have shown just how complex the question of access to justice really is, and how misleading are standard accounts that attribute inaccessibility uniquely to the fact that court processes are slow, complicated and costly.<sup>111</sup> In other words, even if it were accepted that the public policy goal were just to enhance access to courts, there is no self-evident way to achieve this goal. Thus, assuming the delay, complexity and cost of litigation were the determinant features of lack of access, in the absence of unlimited public resources there are trade-offs that must be made between them.

No doubt, providing better financing for legal services before courts through legal aid, pre-paid legal insurance, and like measures, and reducing the cost of lawsuits to individual litigants through small claims courts, class actions, fast-track litigation, contingency fees, revised cost-shifting rules, and tax deductions for expenditures on legal services will address the public's concern with cost.<sup>112</sup>

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<sup>111</sup> See, for the results of one empirical study of "cultural communities" in Montreal, S.C. McGuire and R.A. Macdonald, "Tales of Wows and Woes From the Masters and the Muddled" (unpublished, 1994).

<sup>112</sup> On the other hand, there is evidence that configuring a civil litigation system to be user-friendly will have only a trivial effect on the demographics of court users. The Small Claims Court of Quebec is cheap to invoke, prohibits plaintiffs from being represented by lawyers, has no cost-shifting rules, provides for free execution of judgments, excludes corporations and debt-collection agencies as plaintiffs, is located in communities, holds hearings in the evening and on week-ends, provides free technical advice on the preparation of claims, offers free mediation services, and encourages judges to take an active role in helping litigants present their cases. Yet the socio-demographic profile of plaintiffs closely tracks that of the ordinary civil courts.



Yet it is likely that expanding the range and models for financing the cost of legal services will increase the amount of civil litigation undertaken. Unless the number of courtrooms and judges available to handle this increased litigation is augmented, one can predict that the judicial process will then be less, not more, expeditious.

Similarly, most strategies currently being deployed to improve the efficiency of civil dispute resolution imply trade-offs. Technological innovations such as teleconferencing, greater use of FAX machines, viz-phones and the like, the imposition of case-management systems, the creation of specialized tribunals with different procedural and evidentiary rules (for example, in family and commercial matters), greater specialization of the litigation bar, and so on are likely to make the litigation process more expeditious (and in some cases, perhaps even cheaper for litigants), and can, therefore, be predicted to increase recourse to courts. In the interests of the effective expenditure of public resources the above steps to make civil disputing more efficient should be welcomed, but it should not be assumed that any of these initiatives will reduce the rate of litigation commensurably.

It is possible, by contrast, to take efficiency and cost to the general public as the overriding concern. Changing the relative cost to litigants of a lawsuit (assuming the court costs will constitute a significant fraction of the overall cost of litigation) may enhance efficiency by reducing the demand for judicial dispute resolution. It may also reduce (by the operation of a principle of user-pay) the overall cost of maintaining a civil justice system. But it achieves these goals at the cost of access to the judicial process. It follows that, as long as direct recourse to courts is seen as the preferred mechanism for resolving civil disputes, there are likely to be few improvements to the civil justice system that do not involve trading off cost as against expediency, or trading off cost to individual litigants as against cost to the public.<sup>113</sup>

In the caveat just expressed, however, lies one possible answer to the problem of trade-offs. Many citizens do not see greater access to the courts as a necessary component of access to justice. In fact, public opinion surveys sponsored by the legal professions in Quebec indicate that until they are actually confronted with a problem that they are unable to solve in some other way, citizens are ambivalent even about going to see a lawyer. These surveys do not indicate how much of this ambivalence flows from a concern about the cost of

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See S.C. McGuire and R.A. Macdonald, "Of Presto Justice, Magic Wands and Other Illusions" (unpublished manuscript forthcoming, 1995).

<sup>113</sup> See L. Singer, "Non-judicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor" (1979) 13 *Clearinghouse Review* 569.

legal services and how much can be attributed to an ethic of self-reliance or other factors. Nor do they measure the extent to which official law (or at least some perception of misperception of official law) percolates into popular consciousness. Nor finally do they track the impact that the threat of legal action may have on part-party dispute resolution.<sup>114</sup> At most, one can say that enhanced access to justice (even if viewed as access to official law) need not necessarily involve enhanced access to the processes of the civil courts; it may require only enhanced access to the outcomes of the civil justice system.

The above observations apply with less force to those who have everyday experience with lawyers and courts: businesspeople or officials of organizations such as community groups, clubs and trade unions are more frequently among those who seek out legal advice and ultimately opt for a judicial solution to their problem. Again, there is some evidence that the publicity attaching to the *Canadian Charter of Rights and Freedoms* has enhanced the profile of litigation as a process for solving conflicts, although little is known about the impact of this increased profile on the incidence of civil litigation. Regardless of the above differentials among lay litigants, empirical studies repeatedly suggest that a litigated solution is not generally the preference of the general population. Lawyers, courts and litigation are usually seen either as a last resort for obtaining a substantive remedy, or as a vehicle bringing down public condemnation upon an especially disliked adversary.<sup>115</sup>

For a significant percentage of the general public, the key barriers to access to justice are not objective factors such as cost, complexity and delay but are subjective perceptions. They relate to the degree of confidence they have in the civil justice system: how it treats them; how it treats their problems; how it proposes to reconcile competing claims; what remedies it offers. In brief, for that majority of citizens who do not normally choose to litigate it is themes like disenchantment, disenfranchisement and disempowerment, much more than the cost and delay associated with litigation, that capture the root failings of the official justice system.<sup>116</sup> What is more, by contrast with the experiences of those

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<sup>114</sup> For speculations on these collateral effects of law, see M. Galanter, "Law Abounding: Legalisation Around the North Atlantic" (1992) 55 *Modern Law Review* 1.

<sup>115</sup> See S.E. Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working Class Americans* (Chicago: University of Chicago Press, 1990), especially chapters 7 and 8.

<sup>116</sup> I have attempted to provide a model that explains this result in R.A. Macdonald, "Recognizing and Legitimizing Aboriginal Conceptions of Justice: Implications for a Reconstruction of Non-Aboriginal Legal Systems in Canada" in *Aboriginal Peoples and the Justice System* (Ottawa: Royal Commission on Aboriginal Peoples, 1993) at 232.

who use (or have used) the courts, confidence in the system seems to correlate with outcome, rather than process.<sup>117</sup>

Given that the public's desire for enhanced access to justice does not automatically translate into a desire for greater access to lawyers and courts, the current overcrowding of the civil justice system is paradoxical. Whatever the explanation for overcrowding and backlogs might be, it is not that most citizens are willingly using them to resolve their civil disputes. This being so, explanations must be found elsewhere—either in the behaviour of certain classes of litigants, or of their lawyers, or in structural features of the law and legal procedure. Thus, it may be that courts are crowded because certain types of plaintiffs (for example, business plaintiffs) are excessively using courts to resolve disputes that could be handled elsewhere, or because private citizens are obliged by law to bring lawsuits (as in the case of divorce, child custody, and like matters) in order to obtain a remedy. Again, it may be that courts are crowded because of the configuration of remuneration incentives in the private practice of law, or because of inefficiencies in the system resulting from the fact that it was designed to perform functions other than those that currently comprise the bulk of its workload.<sup>118</sup>

## 26. CONCEPTIONS AND MISCONCEPTIONS OF ALTERNATIVE DISPUTE RESOLUTION

There is, it would therefore appear, no necessary interdependence between the concern of citizens for enhanced access to civil justice and the concern of public officials for making the litigation process less costly and more efficient. This does not mean, however, that the two objectives are irreconcilable. A number of examples will suggest the range of possibilities for achieving both goals at the same time. Certain civil disputes between citizens now necessarily

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<sup>117</sup> On attitudes of users, see T. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990), and E. Lind, et al., "In the Eyes of the Beholder: Tort Litigants' Evaluation of their Experience in the Civil Justice System" (1990) 24 *Law and Society Review* 953. See also, T. Tyler, "The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities" (1989) 66 *Denver University Law Review* 419.

<sup>118</sup> To anticipate later discussion, it is worth asking whether a system apparently designed to adjudicate disputes is the most efficient mechanism in a world where courts preside over a cluster of dispute processes, some within the vicinity of courts and some at a distance. On this theme, see especially, M. Galanter, "Justice in Many Rooms: Courts, Private Ordering and Indigenous Law" (1981) 19 *Journal of Legal Pluralism* 1; "...A Settlement Judge, Not a Trial Judge": Judicial Mediation in the United States" (1985) 12 *Journal of Law and Society* 1; "Adjudication, Litigation and Related Phenomena" in L. Lipson and S. Wheeler, eds., *Law and the Social Sciences* (New York: Russel Sage Foundation, 1981).



processed through the courts could conceivably be channelled elsewhere. A number of civil disputes now processed through the courts simply because business plaintiffs are suing consumers and landlords are suing tenants in their preferred forum could also be streamed away from the judicial system. Still other civil disputes where citizens are effectively obliged to sue a more powerful party in order to obtain redress might well be recast for resolution in a more congenial setting.

These examples reveal that the strategy of enhancing access to justice by increasing the supply of dispute-settlement resources can be pursued by means other than building more courtrooms and appointing more judges. Supply can also be increased by creating lower-cost and more efficient alternatives to the judicial process. Assuming the optimal allocation of disputes to these bodies, and the appropriate configuration of incentives to induce potential litigants to use them, it might be possible to reconcile the goals of enhanced access to justice and efficiency in the expenditures of public resources on the civil justice system. This is a fundamental goal of those who proselytize for "alternative dispute resolution": let the forum fit the fuss! Before any such allocation or reallocation of civil disputes can be effected, however, it is important to clarify exactly what the concept of alternative dispute resolution might conceivably mean.

An initial step in understanding the possibilities of alternative dispute resolution is to develop an inventory of the kinds of institutions and kinds of processes that can be used to handle civil disputes.<sup>119</sup> In this exercise, of course, it must be recognized that any such inventory is no more than an hypothesis about the salient discriminatory criteria: that is, the claim that mediation is different from negotiation, but that adjudication in the Ontario Court (General Division) is the same regardless of the County in which the court sits or the subject-matter of the lawsuit, rests on a complex set of assumptions, and not on a self-evident description of facts.<sup>120</sup>

Once this inventory is developed, a model for grouping these alternatives according to meaningful analytical criteria must thereafter be generated. And this involves exactly the same process of hypothesizing salient discriminatory criteria

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<sup>119</sup> According to a model developed by the Interlex Group, a Montreal A.D.R. specialist, there are more than forty different approaches to dispute resolution. For an academic study see S. Goldberg, E. Green and F. Sander, *Dispute Resolution* (Boston: Little Brown, 1985); F. Sander, "Alternative Methods of Dispute Resolution: An Overview" (1985) 37 *University of Florida Law Review* 1. See also, A. Pirie, *Dispute Resolution in Canada: Present State, Future Direction* (Victoria: Law Reform Commission of Canada, 1987).

<sup>120</sup> For a detailed elaboration of this point, see J. Esser, "Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know" (1989) 66 *Denver University Law Review* 499.

as was engaged in developing the inventory itself. In the present context, the mandate of the Civil Justice Review is to examine alternatives to courts and to adjudication. This suggests that the courts are the institution and the judicial process is the procedure against which all alternatives should be measured. In part for this reason and in part to provide a recognizable structure for the discussion that follows,<sup>121</sup> a formalist rather than an informalist approach to modelling these alternatives initially will be adopted.<sup>122</sup>

Of the principal formal characteristics of the judicial system, the two highlighted in the mandate of the Civil Justice Review are that (i) it is a publicly-managed and funded dispute-settlement institution, and that (ii) it is generally engaged in the adjudication of disputes. Almost all the institutional characteristics associated with courts can be derived from these two features: the constitutionally protected independence of judges, the neutrality of decision-making, established procedures for the conduct of trials, and the obligations to decide like cases alike, to hold hearings in public, and to give reasons for decision.

It follows that a four-square model that signals alternatives to and attenuations of either or both of the primary features of the court system, or even alternatives to and attenuations of some of the detail of the judicial process is a useful way to begin the classificatory endeavour. Thus, there may be publicly managed adjudicative dispute-settlement institutions other than courts; there may be publicly-managed non-adjudicative dispute-settlement institutions—be these courts or other tribunals; there may be privately-managed non-adjudicative dispute-settlement institutions; and there may be privately-managed adjudicative dispute-settlement institutions.

Among the first category (publicly managed adjudicative institutions other than courts) are administrative agencies with the power to hear and decide individual cases: automobile insurance, workers compensation, landlord-tenant, consumer protection, municipal and land-use tribunals, for example. This category also includes any official to whom a “statutory power of decision” has been delegated: an inspector, a registrar, a single-member board of inquiry, a non-consensual labour arbitrator, a Cabinet Minister, and so on. The flexibility of the Ontario legislature to create such non-judicial tribunals is limited, however,

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<sup>121</sup> For an example of a study that eschews *ex ante* taxonomies, see M. Baumgartner, *The Moral Order of a Suburb* (New York: Oxford University Press, 1991), an extremely rich study of conflict and conflict management, that nevertheless offers almost no basis upon which a policymaker could act.

<sup>122</sup> On the implications of adopting such an approach, see A. Sarat, “The ‘New Formalism’ in Disputing and Dispute Processing” (1988) 21 *Law and Society Review* 695 for a discussion of formalist approaches to classification; and compare R. Abel, “A Comparative Theory of Dispute Institutions in Society” (1973) 8 *Law and Society Review* 217 for an anti-formalist perspective.

by two features of Canadian constitutional law. Jurisdiction to decide civil disputes in relation to a number of substantive matters is reserved by section 96 of the *Constitution Act, 1867* to the "Superior" courts.<sup>123</sup> As a result, whenever provincial legislatures seek to confer decisionmaking authority on administrative agencies, or even of inferior courts or minor judicial officers such as Registrars and Masters, highly acrobatic (and not always successful) legal gymnastics are required. In addition, the inability of provinces to shield these tribunals and other decisionmakers from judicial review means, in an era of increasing *Charter*-driven due process litigation, simply doubling the amount of time and effort spent in decisionmaking: the initial non-judicial determination is often followed by a judicial redetermination of the dispute, procedurally dressed up in the form of an inquiry into the initial decisionmaker's authority to decide.<sup>124</sup>

Although the creation of adjudicative administrative agencies has been a popular legislative strategy for a variety of reasons, it is not clear that these tribunals and agencies are any better than courts either at solving objective access to justice problems or at overcoming subjective barriers to access to justice. Backlogs in certain tribunals are as great as in the regular judicial system. The cost of expert witnesses and specialized legal representation is often greater than in ordinary litigation. Lawyerly insistence on more due process in administrative agencies is the inverse of what most people want from non-judicial decisionmakers. Finally, unless there is a careful matching of investigative, legislative, administrative, judicial and enforcement functions in these agencies little access-to-justice advantage flows from simply taking adjudication away from courts and assigning it to a non-judicial tribunal. In other words, while establishing a Workers Compensation Tribunal or Labour Relations Board may have served to promote certain values or goals that seemed to be greeted with disfavour by courts, it is less certain that substantial efficiencies have also been achieved.

A second strategy, complementary to the creation of administrative agencies and tribunals with authority to make judicial determinations, is to establish mandatory non-judicial dispute processing systems—either as a precondition to invoking, or as an alternative to, the ordinary civil disputing process in the courts. Among the variety of processes that have been tried are mandatory mediation in family matters, or in small claims courts, mandatory commercial or labour arbitrations, or mandatory final-offer-selection in consumer contract and

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<sup>123</sup> See generally P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Carswell: Toronto, 1992) at 184-200.

<sup>124</sup> The intricacies of judicial review on this basis are explored in Y.-M. Morissette, "Le contrôle de la compétence d'attribution: thèse, antithèse et synthèse" (1986) 16 *Revue de droit de l'Université de Sherbrooke* 591.



landlord-tenant disputes. Despite the number and diversity of these processes, however, they are all parasitic on the existence of a binding third-party decisionmaking regime. That is, they all take place “in the shadow of the law”. Family mediation that is unsuccessful leads to judicial adjudication; commercial or labour mediations are ultimately backstopped by binding arbitration, or in the case of a first-contract, usually by a final-offer-selection process. In all these mandatory alternatives, the conflict being resolved has already taken on the shape of a regular judicial dispute.<sup>125</sup>

Once again, although these strategies may solve some elements of the access to justice problem (the clogging of the courts and the cost of civil justice), it is not clear that they enhance real access to justice for ordinary citizens. Some studies even indicate that the relative informality of mediation works to reinforce disparities in bargaining power.<sup>126</sup> In addition, simply because mediation is thought to be a desirable complement or alternative to adjudication, does not mean that a non-judicial process is required. Judges routinely mediate conflicts that are presented for adjudication, whether formally, or by strategic interventions in the trial process.<sup>127</sup> Whether these judicial impulses to settlement are effective in reducing cost and delay is, however, difficult to measure.<sup>128</sup>

Even greater diversity in alternative processes for resolving interpersonal and social conflict can be found in private initiatives. Although most of these are characterized by commentators as “alternative” dispute resolution processes, they are in fact only alternative means of trying to adjudicate an issue which has already been cast in a particular legal form. Certainly techniques such as private contractual or *ex post* arbitration, domestic adjudicative tribunals, and industry-

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<sup>125</sup> The values which such possibilities promote are considered in C. Menkel-Meadow, “For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference” (1985) 33 *UCLA Law Review* 495; C. Menkel-Meadow, “Toward Another View of Legal Negotiation: The Structure of Problem-Solving” (1984) 31 *UCLA Law Review* 754.

<sup>126</sup> See S.E. Merry, “Varieties of Mediation Performance: Replicating Differences in Access to Justice” in A.C. Hutchinson, *Access to Civil Justice* (Toronto: Carswell, 1991) 257; T. Grillo, “The Mediation Alternative: Process Dangers for Women” (1991) 100 *Yale Law Journal* 1545. See further, *Court-Based Divorce Mediation in Four Canadian Cities* (Ottawa: Supply and Services Canada, 1988); *Report of the Attorney-General’s Advisory Committee on Mediation in Family Law* (Toronto: Ministry of the Attorney General, 1989).

<sup>127</sup> See, for example, M. Galanter, “A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States” (1985) 12 *Journal of Law and Society* 1, and J. Conley and W.O’Barr, *Rules Versus Relationships* (Chicago: The University of Chicago Press, 1990).

<sup>128</sup> J. Rosenberg and H. Folberg, “Alternative Dispute Resolution: An Empirical Analysis” (1994) 46 *Stanford Law Review* 1487.

managed arbitration or mediation bodies such as one finds in the dry-cleaning, funeral parlour, and travel industries are largely parasitic upon a prior characterization of a conflict as a legally cognizable dispute. The same is true of processes whose primary sanction is publicity: better business bureaus, media consumer hot-lines and even voluntary market-share liability techniques.<sup>129</sup>

Each of the different kinds of non-official alternatives just discussed has the disadvantages of its advantages: three pairs of competing consideration should be noted. Each is largely outside the supervision of the ordinary courts and therefore escapes the adjudicative cast of judicial decisionmaking that afflicts administrative tribunals; but each tends to be less systematic and, with the exception of organized institutional processes such as labour arbitrations, does not generate public precedents. Each depends on the willingness of private parties to co-operate and therefore, if successful, produces decisions more likely to be enforced; but each does not have a built-in means of coercing participation or compliance. Each is managed by a decisionmaker or a institution that is not publicly appointed and therefore depends for its continuance on its success in solving problems; but each does not have the patent independence of the judiciary. Determining the situations in which the relative balance of advantage and disadvantage in each of these dimensions argues for non-judicial regime of dispute settlement presupposes a relatively fine-grained analytical model.<sup>130</sup>

## 27. "ALTERNATIVE" DISPUTE RESOLUTION AND "ALTERNATIVE DISPUTE" RESOLUTION

In addition to the types of alternative dispute resolution institutions just noted, there are also both public and private initiatives directed to policing behaviour and heading off potential conflict before it is crystallized in a legal dispute. Those most frequently encountered in the public domain all have an explicit pre-emptive purpose. Mandatory inspections, and even mandatory insurance (which simply transfers the inspection role to the insurer) are a commonly used technique. Similarly, mandatory driver-education and training, the regulation of door-to-door sellers, the licensing of certain volatile businesses such as travel agencies, or mandatory and risk-related insurance schemes such

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<sup>129</sup> For a discussion of several of these that currently operate in Canada, see P. Emond, *Alternative Dispute Resolution: A Conceptual Overview* (Toronto: Canadian Bar Association, 1988); C. Samson, et al., *Solutions de rechange au règlement des conflits* (Ste. Foy: Presses de l'Université Laval, 1993).

<sup>130</sup> While the study is directed more to issues of substance than to institutional characteristics of civil disputing, the kinds of considerations that would bear on developing such a model are thoughtfully explored in R. Ellickson, *Order Without Law* (Cambridge: Harvard University Press, 1991).

as that found in workers compensation, new home construction and automobile insurance are designed with a pre-emptive purpose in mind. The number and diversity of industry sponsored processes is equally great.<sup>131</sup>

What is a common feature in these diverse strategies is that intervention occurs either before the targeted conduct has actually taken place—a truly pre-emptive regime — or that it occurs early enough in the process that a settlement can occur before the conduct acquires the baggage and label of a legal dispute. This suggests that the idea of alternative dispute resolution comprises two distinct themes. Most often, alternative dispute resolution is thought of as a series of processes for handling, outside the formal judicial process, various types of disputes that have already been filed as lawsuits. Occasionally, it may also refer to processes parasitic on official law—negotiation through lawyers, formalized complaints procedures, media hotlines, and so on. In these acceptations of the expression, alternative dispute resolution functions like diversion in the criminal justice system, and the role of the legislature is simply to design different processes and allocate disputes to each. But where alternative dispute resolution is understood as the attempt to deal with disagreement or conflict prior to its being narrowed for judicial adjudication, the role of the legislature is to find ways to encourage the establishment of processes for handling conflict, not disputes. These processes are, therefore, probably better viewed as processes for solving “alternative disputes” rather than as “alternative” processes for solving disputes.<sup>132</sup>

The considerations addressed in the above two paragraphs raise further doubts about the commensurability of the different goals of the Civil Justice Review even on the narrow question of alternative dispute resolution. Is the ambition to fix up a process of civil litigation that some commentators seem to feel has bogged down courts by allocating to other dispute resolution institutions those disputes that cannot be handled effectively or efficiently by courts? For example, were it to be determined that 25% of the case-load of the Ontario Court (General Division) concerned disputes where less than \$15,000 was in issue, would this necessarily argue for creating a new provincial court—say the Ontario Court (Provincial Civil Division)? Or were it to be determined that 25% of the case-load of the Ontario Court (General Division) concerned disputes relating to heat, maintenance and security in connection with residential tenancies, would

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<sup>131</sup> There is an enormous law and economics literature on all these themes. A good representative example dealing with alternatives to the tort system is M. Trebilcock, “Incentive Issues in the Design of ‘No-Fault’ Compensation Systems” (1989) 39 *University of Toronto Law Journal* 19.

<sup>132</sup> This conception of alternative dispute resolution is explored in P. Noreau, *Droit préventif: le droit au-delà de la loi* (Montreal: Éditions Thémis, 1993).



this necessarily argue for the creation of an administrative agency with broad investigatory and remedial powers?

Conversely, one might ask if the ambition of the Civil Justice Review is to enhance access to civil justice by providing novel institutions and mechanisms by which ordinary citizens may formulate, argue about and resolve their interpersonal and social conflicts in a manner that is both efficient and respects their own views of the problem to be solved and the remedial outcomes to be achieved? For example, were it to be determined that most consumers have no effective redress in product warranty cases, would this necessarily argue for enhancing judicial remedies as opposed to revising the property entitlements of consumer purchasers? Or were it to be determined that most non-unionized employees have no effective recourse in cases of unsafe working conditions, would this necessarily argue for enhanced judicial remedies rather than an efficient labour standards inspectorate backed by a confidential 1-800 telephone number?

As long as access to justice is seen in the mirror of access to lawyers and courts, the two ambitions can work to cross-purposes. In such an understanding, the Civil Justice Review risks being viewed as no more than an attempt to divert certain categories of civil dispute away from the courts without any principled consideration for the optimal allocation of civil disputes to institutions more responsive to the actual wishes of the general public. But within the broader notion of alternative forms of dispute resolution—handling interpersonal and social conflict before it becomes a civil dispute—the two ambitions can be reconciled.

In this broader conception of alternative dispute resolution, the consequence might be that certain disputes now settled outside the judicial process would be re-allocated to the courts, and that certain disputes now decided by courts would be re-allocated to other dispute settlement bodies. Properly managed, these allocations and re-allocations might well have a beneficial impact on rates of litigation and court congestion. But their principal object would be to enhance access to justice. This latter approach rests on the premise that the events of social life can be meaningfully categorized into different types which can then be used to determine the kinds of process, the kinds of institutions, the kinds of remedies, and so on that should be made available for their resolution. In order to test the validity of the underlying premise, however, it is first necessary to develop a model for categorizing interpersonal and social relationships.

## 28. THE RANGE OF POSSIBILITIES FOR CLASSIFYING INTERPERSONAL AND SOCIAL CONFLICT

Any process of allocation involves the matching of two variables: the streaming of civil disputes is no exception. Streaming not only requires an inventory of the different institutional and processual possibilities; it requires an inventory of the different kinds of interpersonal and social conflict. Both these taxonomic exercises must be undertaken before one can analyze either the methods for, or the implications of, streaming civil disputes into different types of dispute-resolution institutions. A first cut at one element of the former based on the implicit ambitions of the Civil Justice Review—judicial versus non-judicial institutions, publicly managed versus private managed institutions—has already been attempted.

The complementary element of the former—an inventory of processual options—will be pursued in the next section. Here, the characterisation of everyday interaction and conflict—a much more difficult undertaking—will be essayed. However many different taxonomies for the grouping of dispute-resolution institutions and processes there may be, there are infinitely more ways of classifying human interaction and conflict. Hence, a first step must be to establish a rudimentary taxonomy of different possible classifications of civil disputes—a taxonomy of taxonomies.<sup>133</sup>

In general, legal doctrine tends to classify substantive phenomena in relation to their sources, their object, their parties, and their nature.<sup>134</sup> Similar classifications may also be applied to civil disputes. Not surprisingly, therefore, it is these same types of classification that the Common law has traditionally

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<sup>133</sup> The most sustained attempt in the alternative dispute resolution literature to develop a taxonomy, rather than just an inventory, of disputes is that by S. Goldberg, E. Green and F. Sander, *Dispute Resolution* (Boston: Little Brown, 1985) who propose six categories for identifying disputes. For a critique of this methodology, see J. Esser, "Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know" (1989) 66 *Denver University Law Review* 499. In the paragraphs that follow a more intuitive approach will be suggested, in part to show the vast range of possibilities for categorization, once the categories of dispute classification are opened up for examination.

<sup>134</sup> No doubt, the most refined classifications of legal phenomena are found in the law of obligations in the Civil law tradition. For a discussion of how classification by source, object, nature, effects, parties, intensity, enforcement and modalities is central to civilian systems of private law, see J.E.C. Brierley and R.A. Macdonald, *Quebec Civil Law* (Toronto: Emond-Montgomery, 1993) at #13-141, and 404-410. While the Common Law has not developed the methodology of classification to the same extent as the Civil Law, there are at least some efforts in this direction. See, for example, J.A. Jolowicz, *The Division and Classification of the Law* (London: Butterworths, 1970).

used in characterizing civil disputes for the purposes of allocating different kinds of cases to different courts. For this reason, in the discussion that follows, the examples will be drawn from the actual practices of contemporary civil litigation. That is, the next few numbered paragraphs will not only set out possible models of classification, but will show how such classifications are already pervasive.

It bears mention, however, that the taxonomy of classifications about to be presented is not intended to provide immediate avenues for making streaming decisions. Criteria that might be deployed for this purpose are canvassed in the next section of this Study. Nevertheless, it is important to point out here that the different classifications suggested speak to civil disputes, and not to human interaction giving rise to interpersonal and social conflict. By focusing on the classification of legally-created civil disputes, already a first limitation of the matching exercise as a means for channelling conflict has been encountered.<sup>135</sup>

## 29. CLASSIFICATION BY SOURCE

The classification of civil disputes according to their source has usually be undertaken along two axes. In the law of civil procedure the notion of source most frequently has a purely geographic connotation. Where did a dispute arise? Sometimes, however, the law makes such classifications according to the slice of social life from which the interpersonal or social conflict arises. What is subject matter of the conflict?

The classification of civil disputes according to geography has historically been used for allocative purposes where the issue to be decided is of local concern or where the amount in dispute is not large. Thus, in the past, a number of cases were exclusively assigned to courts having a limited geographical reach—county courts, small claims courts, local provincial courts, municipal courts, and so on. The theory of such allocations is that it keeps the resolution of everyday disputes closer to the citizen, and ensures an expedited justice in non-urban areas. Its disadvantages are two-fold. Not all areas have a sufficient density of cases as to permit a diversity of legal expertise among adjudicators and judges. Conversely, certain judicial districts are over-loaded with cases that could just as easily be assigned to a neighbouring county or judicial district.

Sometimes disputes are classified by source in the sense of the social situation they reflect—family law, successions, mercantile law, and so on. In modern times, however, this sociological criterion has usually been overtaken by

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<sup>135</sup> On this point see C. Reasons and R. Rich, *The Sociology of Law: A Conflict Perspective* (Toronto: Butterworths, 1978). Compare V. Aubert, "Competition and Dissensus: Type of Conflict and Conflict Resolution" (1963) 7 *Journal of Conflict Resolution* 27.



classification on the basis of the legal characterization of the issue to be decided—contract, divorce, mortgage, will, etc. About the only everyday areas remaining where classification on this basis remains are those involving “family law” generally speaking, “successions”, and (in jurisdictions like Quebec) “youth”. Of course, there remain some specialized functional classifications such as admiralty, but today even most commercial cases are classified, if at all, by reference to their formal legal characterization—intellectual and industrial property, bankruptcy, etc. The advantage of classification according to the subject-matter source of the conflict is specialization; its disadvantage is that the volume of any given type of dispute may not be sufficient to warrant specialization outside major urban centres.

### 30. CLASSIFICATION BY OBJECT OF THE DISPUTE

The most commonly encountered distinctions of this type relate to categorization by means of the amount in dispute. Nevertheless, in the past, the Common law has also classified civil disputes according to a number of other criteria. Among the more important distinctions were those drawn between real actions and personal actions, between actions having for their object real estate or personal property, between ordinary civil actions and recourses in judicial review, and between actions having for object the determination of status or claims to property or compensation.

Distinguishing between civil disputes according to the amount of a claim has historically been used to differentiate between provincial, county and high court costs rules. It has also been used to determine when automatic rights of appeal (as in the case of the Supreme Court of Canada) were permitted. Today such a criterion is deployed to define the jurisdiction of the Small Claims Court. The disadvantage of a monetary criterion is that it does not speak to the inherent public importance of the dispute in question, nor to the complexity of the legal issue to be determined, nor even to the relative importance of the amount to the disputing parties. On this last point, it is worth notice that a ten thousand dollar dispute to someone who is unemployed is more important than a ten million dollar lawsuit is to someone like Michael Eisner, whose annual salary is reported to be in excess of 150 million dollars.

Because classification according to the amount in dispute also does not speak to cases where the question to be decided does not have a monetary equivalent—recovery of land, divorce, paternity, etc.—the Common law has also distinguished between civil disputes on the basis of the object of the action. Certain family matters used to be within the resort of ecclesiastical courts, and now go exclusively to Family Court. Courts of Common Pleas and Manorial Courts were unable to adjudicate title to land. Surrogate and Probate courts exercised jurisdiction in respect of probate of wills and devolution of estates.

Only Superior Courts (and not County and District Courts) were entitled to exercise the supervisory jurisdiction in judicial review of inferior tribunals or to hear actions for defamation.

Like classification by source, classification by object is useful in streaming disputes so as to develop judicial expertise. Like classification by reference to the amount in dispute, classification by object also enables a judicial hierarchy to be established. Finally, classification by object permits the development of procedural rules attuned to the specific requirements of the case. The disadvantage of this type of classification, however, is that the distinctions drawn are often not fine enough, and they can quickly become outdated.

A further type of classification by object is that which depends upon the kind of hearing process being followed. The most obvious example of classification on this basis can be seen in the limitations placed on trial by jury. Similarly, it is worth remembering that Courts of Equity typically did not hear oral evidence but conducted their primary fact-finding process on the basis of affidavits. Such procedural limitations apply today to applications for judicial review. Again, while most civil disputes are heard in open court, *in camera* hearings are permitted in a wide range of family law cases, especially where children are involved.

In so far as classification on the basis of the remedy being sought is concerned, an inherent feature of the writ system of the Common law was that because certain kinds of writs only issued from certain courts, only certain kinds of remedy could issue from those courts, regardless of what the legal issue in dispute happened to be. Thus, while most kinds of courts can grant damages, other courts have exclusive jurisdiction to grant equitable relief such as injunctions, orders for specific performance, and the like. What is more, certain types of administrative agency have broad remedial powers not available in the courts. For example, Human Rights Commissions can order that apologies be given, or make all manner of in kind orders and awards.

### **31. CLASSIFICATION ON THE BASIS OF THE PARTIES TO A DISPUTE**

Since the *Judicature Acts* of the 19th century, classification on the basis of the parties to a dispute has played a diminishing role in Common law systems. No longer do formal class distinctions influence the allocation of civil disputes. For example, there are no special courts to hear claims between nobles, or between ecclesiastics. Nevertheless, certain differentiations of judicial jurisdiction continue to be drawn on the basis of parties to the lawsuit. Any classification of this nature requires analysis on at least two different levels: classification

according to who is the plaintiff, and classification according to who is the defendant.

In so far as classifications dependant on who are the plaintiffs in the case, the idea is to distinguish according to who is seeking relief, regardless of the amount of dispute or the defendant, or the type of dispute. In Quebec until recently, only physical persons could be plaintiffs in the Small Claims Court. No incorporated companies could avail themselves of the Small Claims Court process. The disadvantage of this type of classification is that it does not speak to functionally equivalent situations: why should an ordinary architect be permitted to sue in the small claims court to recover fees owing, but an architect who is incorporated not be so permitted? It is also possible to distinguish between cases where the plaintiff is an "infant", or a "succession", or the government. In all these cases the Common Law has historically streamed cases to different courts solely on the basis of who the plaintiff is.

As far as classification in relation to the defendant in a case is concerned, similar considerations are in play. For example, tort actions against the Queen in Right of Canada must, in principle, be taken in the Federal Court. The jurisdiction of administrative agencies is also defined in many cases according to who the defendant is. The geographical jurisdiction of local and district courts is invariably decided on the basis of the domicil of the defendant. The disadvantages of classification on the basis of the defendant are the same as those relating to classification by plaintiff: it is not always apparent why the legal form in which a person carries on business should matter to the jurisdiction of a judicial tribunal.

## **32. CLASSIFICATION ACCORDING TO THE NATURE OF THE DISPUTE**

Apart from classification according to the amount of money in dispute, this is probably the most frequent type of classification that one finds in modern Common law systems. There are two different ways in which such classifications can be approached. On some occasions, the law takes the legal label which is attached to a conflict as a criterion of distinction. On other occasions, the law seeks to characterize disputes according to the character of the principal issue to be decided.

In many cases the legal characterization of the problem determines the jurisdiction of the court that may hear the dispute: actions in defamation are restricted to certain courts; as are bankruptcy, admiralty, and devolution of estates questions, etc. While the legal character of a Common law dispute—as tort, contract, restitutionary claim, sale of goods, lease of real estate, mortgage, etc.—does not often determine judicial jurisdiction, it is invariably the criterion deployed to determine the authority of administrative agencies. Thus, a workers



compensation tribunal has authority to hear cases involving workplace injuries, but not the identical injury suffered at home; a landlord-tenant tribunal has authority to hear cases relating to breaches of quiet enjoyment caused by neighbouring tenants, but not by persons in adjacent buildings. When applied to the jurisdiction of administrative tribunals the advantages of classification on this basis flow from the possibility of generating expertise and efficiency in dispute resolution. Among the most apparent disadvantages of this model for classifying civil disputes is that it abstracts from some of the most significant sociological characteristics of the disagreement: rather than the human conflict which produces the legal dispute being the criterion of differentiation, the criterion is what label the law gives to the dispute.

Classification based on the character of the principal issue to be decided is another possible avenue for streaming civil disputes. A criterion like this presumes that not all types of lawsuit raise the same type of legal issue. For example, many types of case require the judge to apply a relatively straightforward legal prescription to a relatively straightforward set of facts. There is much judgment involved in finding the facts, and in interpreting the legal prescription, but the legal rule itself does not involve *ex post facto* considerations. The dispute is a corrective justice dispute and the rule to be applied is an *ex ante* standard. But an increasing number of disputes now brought before the courts have a large policy component. This is true especially of civil disputes involving an issue under the *Canadian Charter of Rights and Freedoms*. But it is also true of what commentators call polycentric issues—most notably questions of distributive justice and decisions involving the allocation of scarce resources such as timber limits.

In the past, there have been various proposals for streaming civil disputes on this type of basis. For example, in the 1970s it was suggested that the Ontario Court of Appeal could be divided into two divisions: a General Section and a Juristic Section. The former was to hear appeals that did not involve any law-developing function, whereas the latter was only to hear cases law-developing functions or the resolution of policy issues.<sup>136</sup> The difficulties of channelling disputes according to the presence or absence of a policy component are many. First of all, whether or not a dispute has a policy or law-development component is not always apparent at its outset. Secondly, often the conclusion that a case has such an aspect is reached long after the decision was rendered: a case sometimes serves as a significant precedent not for what it was thought to have decided at the time, nor even for what the words of a judgment actually said, but

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<sup>136</sup> See *Report on the Attorney General's Committee on the Appellate Jurisdiction of the Supreme Court of Ontario* (Toronto: Ministry of the Attorney General, 1977). It is noteworthy that in canvassing different methods for dividing up the jurisdiction of the Court of Appeal, many of the classificatory possibilities just reviewed were canvassed and rejected (pages 17-28).

because of the use to which the case is later put. Finally, it is not clear exactly what policy prescription allocation on this basis would yield. Sometimes policy-driven adjudications would seem to be most appropriate for non-judicial expert tribunals; on other occasions the courts have been constituted as the primary agency for developing the policy implications of a particular statute. In other words, it is almost impossible to characterize a dispute on the basis of whether a policy issue is involved without inquiring into the substance of the policy to be considered.

There is a further dimension to characterization on the basis of the nature of civil dispute that has taken on increasing significance in recent years. Sometimes the legislature assigns jurisdiction on purely pragmatic grounds. For example, the decision to create particular specialized administrative tribunals such as the Workers Compensation Appeal Tribunal arises because of a balancing of factors such as the volume of disputes to be decided, the average amount in dispute in each one, the relative importance of fact and the expert interpretation of fact, and the need keep decision-making policy consistent, yet capable of significant evolution over time. In such cases, the primary motivation for allocative pragmatism and the central component in the calculus of efficiency is, of course, volume rather than these other considerations.

### **33. THE UTILITY OF CLASSIFYING DISPUTES AS AN APPROACH TO STREAMING CIVIL DISPUTES**

The above observations are intended to raise the question whether there can be easily applied criteria for typecasting certain disputes so as to allocate them either to courts (or among different courts) or to institutions other than courts for resolution. In presenting this brief inventory it was not suggested either that all or any of these criteria should be used by policymakers. Nor was the intent to suggest that each of the axes is of equal importance, or that the features of civil disputes that they highlight are commensurable. Rather the object has been to suggest that the exercise of classifying civil disputes is even more complex than that of classifying different institutions for dispute resolution, and equally complex as that of classifying processual possibilities. Four conclusions may be drawn at this point.

First of all, in the Common law tradition a variety of classificatory techniques have historically been used for allocating disputes between various types of courts and, more recently, between courts and administrative tribunals. In other words, the idea of streaming disputes into different kinds of institution for resolution is not new. Nevertheless, apart from the case where an administrative tribunal is given exclusive jurisdiction over a certain type of dispute, these different characterizations have not usually been applied in order to exclude certain types of civil disputes from courts. The task presupposed by

a streaming exercise of the type contemplated by the mandate of the Civil Justice Review has, therefore, several novel elements. For example, are the kinds of consideration that would be relevant to allocating disputes among courts equally relevant when disputes are to be allocated to private decisionmakers? And how would these considerations be affected if the courts were to retain a jurisdiction in appeal? The task of the Fundamental Issues Group is, therefore, to attempt a synthesis of the known approaches to allocating civil disputes and to isolate key variables that could be promoted as first-order selection principles.

A second conclusion that flows from the above discussion is that, in almost every case, regardless of why or how the differentiation is drawn, it will have both disadvantages as well as advantages. In other words, all streaming decisions will involve trade-offs. What is more, it is almost impossible to know what configuration of civil disputing these trade-offs will produce. Economists can model outcomes on the basis of incentive analysis. Sociologists can model outcomes on the basis of power analysis. Political scientists can model outcomes on the basis of public choice theory. None, however, has a monopoly on truth in prediction. If anything, experience teaches that there is no magic allocational formula that can be applied so as to give a sure guide either as to how these trade-offs should be made in individual cases or as to the likely outcome of any particular allocational decision. Indeed, the history of the Common law has shown that these distinctions have grown up primarily as a result of procedural and remedial considerations, rather than on the basis of any *a priori* principled criteria. The task of the Fundamental Issues Group is, consequently, to abstract from these lessons of experience, identifying which kinds of allocation seem to work in which situations, and why.

Third, in the past, the reasons motivating legislatures to think about alternatives to the court system were time- and place-specific calculations of cost, workload, efficiency, and effectiveness of outcomes. In other words, streaming decisions will typically be made on the basis of *ad hoc* assessments of the nature of the problem to be solved, the potential solutions, and the likely impact of the chosen solution, all heavily influenced by imponderables like insight and intuition. The absence of reliable data about how many disputes of each category are presently in the court system, about how many days of court time they typically take, and about the effectiveness of judgments rendered makes effective analysis of potential alternative solutions more difficult. It follows that, from the point of view of principle, the most defensible streaming criteria may, in fact, do very little to reduce the burdens on the court system. The task confronting the Fundamental Issues Group is, as a result, to decide what particular problem any potential streaming decision is meant to address.

Fourth, regardless of whether principled means for distinguishing between categories of civil disputes and for allocating disputes among various types of



dispute-settlement bodies do exist, the symbolism of the judicial process (and especially the symbolism attaching to the independence of the judiciary) is so powerful that almost all alternatives either to courts or to judicial dispute-resolution (whether in or outside formal court processes) will be perceived as "second-class". This is especially the case for constituencies that traditionally have not had formal legal rights to vindicate, or that traditionally have seen their revendications excluded from the judicial process. A concern with the symbolism of judicial dispute resolution is especially prevalent where the initial recognition of the claim took a judicial form: where legal recognition was designed to contest judicial law, as in the case of labour relations, alternatives to courts are not viewed with disdain. But where groups have succeeded in obtaining legal recognition before the courts only after lengthy political struggles, they are among those most resistant to non-judicial dispute resolution. And this resistance is greatest where the suggested alternative is a non-coercive, non-third party rights adjudication such as mediation. In other words, the political process will ensure that certain matters remain within the resort of the courts, regardless of how persuasive the analytical rationale for displacing them might be. The task facing the Fundamental Issues Group is, therefore, to determine where the political symbolism of public adjudication must take precedence in the allocative calculus.

These four conclusions should not be understood as an argument that the entire project of seeking to make civil justice more accessible, expeditious, efficient and less costly by means of a better allocation of disputes among various public and private institutions is doomed to failure. Indeed, they can be interpreted as pointing in the opposite direction. Because the range of possibilities is so great, and because the exercise can only be undertaken on an experimental case-by-case basis, the usual constraints on legislative action flowing from the perceived need to achieve perfection are absent. Everything depends on the way in which the allocative endeavour is approached and the process by which individual streaming decisions are taken.<sup>137</sup> These four conclusions should also not be taken as an argument that the efficiency goals of the Civil Justice Review cannot be reconciled with the political goals of enhanced access to justice. But as earlier paragraphs of this section revealed, it is often the way in which civil disputes are formulated that determines both the workload of the courts, and the accessibility of different dispute resolution institutions. Exploring how, if at all, to achieve the best match between

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<sup>137</sup> This is the gravamen of the essay by John Esser, "Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know" (1989) 66 *Denver University Law Review* 499. For a thoughtful review of the kinds of arguments about the quality of justice that are implicit in discussion of alternative dispute resolution, see D. Luban, "The Quality of Justice" (1989) 66 *Denver University Law Review* 381.

substantive entitlement, institution, process and civil dispute is the subject of the final section of this Study.

## **SECTION B. KINDS OF CIVIL DISPUTES OPTIMALLY RESOLVED BY DIFFERENT INSTITUTIONS AND PROCESSES**

### **34. EXPERIENCE, LOGIC AND INTUITION IN THE ALLOCATION OF CIVIL DISPUTES**

One of the recurrent human failings that afflicts almost all attempts to effect change in social institutions is forgetting what one is trying to do. Sometimes this failing produces quite positive unintended consequences. Momentarily losing track of the object of an exercise can lead to novel ways of approaching a problem. Most often, however, it leads to the repetition of previous mistakes, or even to a worsening of the situation. In order to avoid such pitfalls when thinking about alternative dispute resolution, it is worth restating the object and mandate of the Civil Justice Review: to develop and recommend strategies to produce a more effective, less costly and speedier civil justice system so as to maximize the efficient use of public resources currently committed to civil dispute resolution. In other words, the idea of streaming civil disputes into one or another dispute-resolution forum is not an end in itself. The systemic rationality or elegance of the institutional outcome is a trivial goal as compared to the effectiveness of the proposed solution.

Given these purposes, what are the various ways in which allocative decisions might be made? The traditional methodology of professional law reformers and doctrinal scholars is to postulate a small number of axiomatic principles and then deduce an entire procedural structure from these few principles. Would that this coolly rational deductive methodology were alone sufficient. But law reform is a human endeavour, and the fields of civil procedure and remedies are strongly resistant to logical deduction. The traditional methodology of the judiciary and litigation practitioners is to begin with the precise problem to be solved, inducing any general principles after the fact. In my view this somewhat messy inductive methodology is as likely as anything else to lead to concrete results.

Law reform is a highly experimental enterprise. This is true however it is carried out, and regardless of the object of the reform. The task of streaming disputes must, therefore, be approached on the assumption that any proposals will reflect a complex mix of principle and pragmatism—of criteria rationally deduced from first principles, and criteria rationally induced from experience. In this endeavour, finding the right balance is much like the exercise of judicial judgment. The educated intuition of the reformer about the relative importance of these different factors will be the most important guiding factor. The next

several paragraphs suggest various mechanisms for marrying logic and experience.

### 35. SURVEYING HOW CIVIL DISPUTES SHOULD BE STREAMED: THE LESSONS OF EXPERIENCE

As a first step in trying to learn the lessons of experience it is important to remember that the present system of civil justice did not arise in a vacuum. Its current configuration is the result of political struggles, economic forces, ideology, experimentation by trial and error, institutional resistance to change, *ad hoc* compromise, self-interest, the novel use of ancient procedures, and simple lethargy. Of course, one should not be wedded to any existing system simply because it exists; but one should not presume, on the contrary, that all of a system's operating assumptions are without merit. To derive full benefit from accumulated experience requires the law reformer to proceed through several preliminary steps.

To begin, an evaluation of the possibilities for reconfiguring the civil justice system presupposes an understanding of the current system. Twenty-five years ago, the McRuer Commission attempted an exhaustive inventory of statutory powers and statutory powers of decision in Ontario. Since then there have been many new powers created by legislation. Twenty years ago, in a study for the federal Law Reform Commission, over 15,000 discretionary powers set out in the revised statutes of Canada were identified.<sup>138</sup> Since then an even greater number and variety of discretionary powers have been created. Without an inventory of the kinds of decisionmaking powers and institutions that currently form the backbone of the civil justice system in Ontario, it is impossible to make informed decisions about the possible effects of any reallocation of civil disputes.

As a second step in the law reform exercise, it is necessary to bring the supposed values of the current system of civil disputing to explicit attention. Many citizens—indeed many lawyers—would not be able to articulate why we have a judicial system, let alone specify its operating assumptions. Identifying institutional values such as objectivity, neutrality, and integrity, and procedural values such as the right to present one's case in one's own way and to hear the detail of the case that one's opponent is advancing is a useful first step in auditing the performance of the contemporary civil justice system. It also helps to clarify which of these features are essential to which types of civil dispute. The point is that because the legislature may cast (or may decline to cast) almost any interpersonal or social conflict as a justiciable dispute, it is important to find

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<sup>138</sup> See P. Anisman, et al., *A Catalogue of Discretionary Powers in the Revised Statutes of Canada 1970* (Ottawa: Law Reform Commission of Canada, 1975).



out what values the decision to formulate them in such a manner is thought to advance.<sup>139</sup> Not surprisingly, many such values that immediately come to mind are those more associated with high profile “rights” litigation—anti-discrimination actions, for example—than with everyday family, contract, tort and property lawsuits.

An identical effort of value clarification should be undertaken in respect of all other public dispute-resolution bodies. What substantive and procedural values do we associate with labour boards, workers compensation boards, securities commissions, and so on? And how well does the design of these institutions promote the values we ascribe to them? Complementing this exercise should be an attempt to deduce common characteristics, if any, of existing allocations to non-judicial institutions.<sup>140</sup> For example, what, if anything, do transport boards have in common with municipal commissions? And what does the inspection process under the *Lightning Rods Act* have in common with the administrative regime of rent control?

These lessons of experience about current judicial and administrative decisionmaking should not be taken as mandatory guides to how streaming should be effected. But they do provide important insights into the forces, factors and assumptions that have shaped the current configuration of the civil justice system. The attempt to learn about the system of civil disputing by investigating the values it purports to promote is only one possible way of canvassing the issue. A third type of survey would be to measure the actual performance against these standards. But as noted in the Introduction, hard statistics are notoriously lacking. There is simply not enough reliable data in enough detail to make more than educated guesses about the landscape of civil disputes.<sup>141</sup>

This absence of data about the existing configuration of civil disputing suggests a fourth preliminary step. Whenever facts are lacking, subjective perception comes to play a more significant role in shaping human judgment. For this reason it is important to canvass perceptions of the current system, whether or not these perceptions have any basis in fact. Any number of constituencies

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<sup>139</sup> Compare D. Trubek, “The Construction and Deconstruction of a Disputes-Focused Approach: An Afterword” (1980-81) 15 *Law and Society Review* 727; O. Fiss, “The Social and Political Foundations of Adjudication” (1982) 6 *Law and Human Behaviour* 121; O. Fiss, “Against Settlement” (1984) 83 *Yale Law Journal* 1073.

<sup>140</sup> See, for example, the discussion in W. Bogart, *Courts and Country* (Toronto: Oxford University Press, 1994), chapters 3 and 4.

<sup>141</sup> See T. Tyler, “The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities” (1989) 66 *Denver University Law Review* 419.

should be canvassed for their views: the judiciary,<sup>142</sup> the bar and court users,<sup>143</sup> on the one hand; administrative decisionmakers, public servants and the general non-litigating public on the other.

All Ontario Court General Division judges should be asked for their opinions about the process of civil disputing: what kinds of civil cases do they feel take up most of their time? what kinds of cases do they feel that they can adjudicate most efficiently? what kinds of cases not currently in the judicial system should be heard by courts? what kinds of disputes seem to produce a mismatch of substance and process? what kinds of disputes do they most dislike hearing, and why? and what kinds of civil cases would they most like to see handled elsewhere, and why?

In this opinion research, it is important to deploy a reliable survey instrument. For example, judges could be asked to tick off boxes identifying kinds of civil dispute that should be allocated to the courts, those that should be allocated to other public decision-makers and those that should be allocated to private decision-makers. They could also be asked, on the basis of the classificatory criteria noted above, to make specific recommendations about the *forum* of dispute settlement, the decision-making procedure to be followed (strict adjudication, adjudication *ex aequo et bono*, mediation, and so on), and the institutional constraints to be placed on decision-makers (public or private nomination and remuneration, single-person or tri-partite panels, obligation to give reasons, and so on).

A like survey should also be undertaken with respect to lawyers, court users and potential court users, asking first, what types of civil dispute should necessarily go to court and what should necessarily be kept out of court. The opinion of both the litigation bar and lawyers not normally engaged in a litigation practice should be sought. Among the users and potential users to be canvassed one would want to include both randomly selected individuals and organized interest groups of as diverse a complexion as possible. The latter might include, for example: employers organizations and trade unions; women's groups; groups representing disadvantaged members of Ontario society; consumers groups; trade associations; landlords groups and tenants associations; professional associations; manufacturers associations; pension managers associations; bankers and lenders associations; estate administration associations; social service agencies; anti-

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<sup>142</sup> On the importance of perceptions of judges, see S.C. McGuire and R.A. Macdonald, "Wizards of Oz: Judicial Scripts in the Dramaturgy of the Small Claims Court" (forthcoming, (1995) 10 *Canadian Journal of Law and Society*).

<sup>143</sup> See E. Lind, et al., "In the Eyes of the Beholder: Tort Litigants' Evaluation of Their Experience in the Civil Justice System" (1990) 24 *Law and Society Review* 953.

poverty organizations; neighbourhood associations; multi-cultural groups; injured workers groups; credit counselling agencies; and so on.

One should not, of course, assume that there will be any great congruence in the specific responses given. Not only will there be divergences in opinion among the different groups canvassed, there are likely to be important divergences even within groups. For example, among judges some may want to hear only commercial litigation while others may want only family litigation. Among the general public, many associations and interest groups will claim that their disputes should be brought before the courts—although they will each make prudential arguments about streamlining the litigation process so that other types of disputes will be excluded.

This seeming lack of consensus should not be unduly troubling. The purpose of the survey is not simply to tabulate the results received. It is, rather, to assess the responses given against a matrix of existing institutions, the values they are thought to promote, and their actual performance. On this basis one could then look for patterns and second order coherence in the responses given, and plot these against principled criteria for allocating civil disputes.

### 36. PRINCIPLED CRITERIA FOR ALLOCATING CIVIL DISPUTES: THE LESSONS OF LOGIC

In view of the lengthy inventory of potential allocative criteria presented earlier, and in view of the extensive literature in the United States proposing and contesting categories for analyzing the forms and structures of alternative dispute resolution, the task of deducing principled criteria for streaming civil disputes appears daunting.<sup>144</sup> Given the purposes of the Civil Justice Review, however, it is necessary to develop a “principled” decisional framework for addressing questions of dispute allocation.

Yet the limitations of any such framework must be acknowledged at the outset. First, as soon as one proposed a model of inquiry, one automatically structures the inquiry. Just as legal recognition transforms human interaction by giving it a defined shape and label, so too any model transforms our ability to see different patterns of interaction by classifying data into a closed set of

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<sup>144</sup> The Symposium in the *Denver University Law Review* is particularly instructive on this point. Two of the best such studies are those of Tom Tyler, “The Quality of Dispute Resolution Procedures and Outcomes” (1989) 66 *Denver University Law Review* 419, and John Esser, “Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know” (1989) 66 *Denver University Law Review* 499. The second of these studies, at pages 518-534 especially, shows just how difficult the task of constructing a model for assessing (and by implication) allocating civil disputes really is.



available forms. Second, just as legal recognition operates so as to process its own creations, any model necessarily contains within itself judgments about what features of the social phenomenon being modelled merit attention and deserve measurement. Third, just as legal recognition does not solve problems of human interaction but only provides hypotheses for their negotiation, so too, no model or framework will automatically apply itself to particular cases.

Taking these caveats seriously leads to the conclusion that there are an infinite number of possibilities for developing principled criteria for allocating disputes between courts and other public mechanisms, and between public and private dispute-settlement mechanisms. In order to keep the discussion manageable, however, these possibilities will be sorted into three broad categories, flowing from the three elements of any allocative endeavour: as Aristotle noted, solving problems of distributive justice presupposes a set of goods to be distributed, a set of beneficiaries amongst whom the distribution is to be made, and a criterion of distribution. Any one of these elements may be adjusted in the distributive exercise.<sup>145</sup> For present purposes one can consider the goods to be distributed as being “civil disputes”; we can consider the beneficiaries to be the different forms of dispute-settlement institution being proposed; and we can consider the distributive criterion to relate to both the locus of choice and the basis upon which the allocative choice is made. Because the nexus between the three produces the distribution, there can be three broad approaches to the task of allocating civil disputes, each involving an adjustment to a different member of the distributive triptyque. These can be set out summarily as follows:

- (i) Defining the Set of Beneficiaries, or assigning disputes by attempting to match an institution to a process of social ordering. That is, allocation on the basis of the type of issue that is presented for decision. Is the case about the attribution of a claim of right or an allocation? is it a case which involves a one-off transaction or an ongoing relationship?
- (ii) Defining the Set of Goods or assigning disputes according to judgments about their relative importance. That is, allocation on a cumulative points basis—for example, the various criteria already canvassed (amount in dispute, character of plaintiff and defendant, remedy sought) could be scaled and different weights assigned to each unit on the scale, so that disputes would be streamed according to how many points they accumulate.

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<sup>145</sup> In another place I have attempted to show the value of thinking about legal problems in terms of distributive justice. See R. A. Macdonald, “The Counter-Reformation of Secured Transactions Law in Quebec” (1991) 19 *Canadian Business Law Journal* 239, at 245-253.

- (iii) Defining the locus of choice in establishing the criterion of distribution or assigning disputes according to either the decision of the legislature or the wishes of disputants. That is, allocation on a consent basis—for example, the plaintiff and the defendant could negotiate the forum within which their dispute would be heard, and such consent could be given either after, or in some defined cases before, the dispute arose.

It should not be assumed that these three approaches are mutually exclusive. Distributions may be made by keeping each of the three elements open for adjustment. Decisions about processes of social ordering may well bear on how the points allocation of disputes is structured. The relative value of points assigned may well determine the kinds of cases where parties should be permitted themselves to stream their disputes.

There is, nevertheless, one additional factor that bears on how these elements are actually combined. The first two of these approaches necessarily require the legislature to take an *ex ante* policy decision about the available types of dispute-settlement institutions, and the available types of disputes. That is, they presuppose a prior legislative definition of the outside possibilities for dispute allocation. The third, however, presumes that the legislature, having structured the allocational problem in a certain way, can then decide whether there should be an obligatory stream of certain types of civil dispute to certain types of institutional process, or whether it should simply develop incentives so that disputants will be inclined to choose one or the other avenue, or whether, having developed this inventory, it leaves disputants relatively unconstrained in their decisions about where and how to engage in civil disputing. In the discussion that follows the potential and problems of each of these allocative alternatives will be explored in some detail. Thereafter, necessary constraints on any such system, especially where private decisionmaking is in issue, will be reviewed. This section will conclude with a brief comment on the role of intuition in making these allocative decisions.

### 37. PROCESSES OF SOCIAL ORDERING

There is an extensive literature in the United States (and to a lesser degree in Canada) on what might be called the forms and limits of different processes of social ordering.<sup>146</sup> This literature not only attempts to discern the various

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<sup>146</sup> The two most well-known efforts of this type originate in the Harvard Law School. See the unpublished materials by Henry Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tentative edition, 1958), and the posthumous collection of essays written by Lon Fuller in the 1950s and 1960s entitled, *The Principles of Social Order*

processes of social ordering known to modern market economies, but also to identify the various forms and sub-types of each of these processes, and the procedural mechanics and due process guarantees which are appropriate to each.

A number of ideas underlie the exercise. For some scholars, the belief that different social institutions—courts, administrative agencies, legislatures—have different decisionmaking competencies is central. Thus, it is thought that courts should not be assigned what are essentially policymaking tasks. For others, it is not so much different social institutions that have limited decisionmaking competencies, but rather it is that different processes of social ordering—adjudication, mediation, elections—are a suitable response to only certain kinds of social problems. Thus, it is thought that adjudication is not an effective decisionmaking process when the dispute in question is based on considerations of policy rather than on the application of pre-existing rules.

It is the second of these approaches that is most helpful for present purposes. There are two reasons for preferring a process approach over an institutional approach. First of all, it is a better tool for analyzing present practices. Today courts are expressly given policymaking duties by the legislature. Unless one wants to revisit the political debates that led to these choices one must accept that the legislature had good reasons for preferring the symbolism of the judiciary as decisionmaker over the pragmatic counsel of institutional competence. Focusing on process helps reveal these symbolic reasons. Secondly, by focusing on process rather than institution, one highlights the fact that institutional competence flows from the way in which the legislature chooses to formulate a civil dispute. There are very few human conflicts that cannot be recast in a manner suitable for adjudication. Hence a process analysis does not purport to exclude certain matters from judicial determination. It simply indicates how these disputes should be formulated in order to take maximum advantage of the institutional features of the judicial process.<sup>147</sup>

One can summarize the initial learning of the legal process approach to allocative questions, at least as elaborated by Fuller, by saying that social ordering processes are of three main types: third-party decision processes; party-

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(Durham: Duke University Press, 1983). While these authors take quite different approaches to the problem, their basic themes are similar. Over the past 25 years an extensive alternative dispute resolution literature attempting to apply the legal process model has developed. For a discussion of the project see notably, F. Sander, "Alternative Methods of Dispute Resolution: An Overview" (1985) 37 *University of Florida Law Review* 1.

<sup>147</sup> The capacity of different types of conflict to be formulated in various ways, and the need of the legal system to permit their recasting is explored in R.A. Macdonald, "A Theory of Procedural Fairness" (1981) 1 *Windsor Yearbook of Access to Justice* 3.



party decision processes; and institutional-rule decision processes.<sup>148</sup> Of course, others have used Fuller's insight differently, both in identifying different taxonomies of dispute settlement processes, and in assuming that these processes actually exist in a particular, and defined form.<sup>149</sup> To give a sense of how this type of approach might be marshalled to guide a legislature in thinking about allocational decisions, these different processes will be briefly elaborated.

Three main types of third-party decision processes may be noted, each of which is itself subject to several variants: classical adjudication; consultative processes; managerial decision. As noted in the second Part of this document, the logic of Common law adjudication requires independent decision-makers, proofs about past events (cold facts) and legal arguments about the interpretation and application of already existing rules, proofs and arguments in the presence of opposing parties, no off-the-record considerations and a decision strongly responsive to the proofs and arguments presented. These features of adjudication lead commentators to the conclusion that it is the best process for deciding ordinary rights claims. Adjudication can be undertaken either by public institutions or through private arbitration. It can be undertaken by means of an inquisitorial or an adversarial process. It can be undertaken by single person or multi-member tribunals. The exact mix of these various sub-elements of adjudication will have a bearing on the efficiency and cost of the decisionmaking process, but one can be certain that the dispute in question can be meaningfully decided.

The second third-party process—the consultative process—resembles classical adjudication, but in these cases the decisionmaker may also bring off-the-record policy or equitable considerations to bear on the decision. The decisionmaker in such cases typically is also chosen because of a presumed factual expertise. Even though it is frequently undertaken by judges sitting in open court, the logic of consultative processes is thought best for making broadly based discretionary decisions such as in dependent's relief, family property, child custody, and commercial reorganization disputes.

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<sup>148</sup> I take this taxonomy from a number of his works, the most comprehensive of which is the Introductory Note to the Third Chapter of the third edition of his contracts casebook: "The Role of Contract in the Ordering Processes of Society Generally" in L. Fuller and M.A. Eisenberg, *Basic Contract Law* (3d ed.) (St. Paul: West Publishing, 1973) at 89.

<sup>149</sup> See notably, S. Goldberg, E. Green and F. Sander, *Dispute Resolution* (Boston: Little Brown, 1985) at 7-10. These authors propose a taxonomy of four pure types (adjudication, arbitration, mediation and negotiation) and five mixed types of dispute settlement institution. More importantly, they suggest that there are necessary features to each that can be used to make dispute allocations. Fuller never made such an argument, and indeed, his project in his major book *The Morality of Law* (rev. ed.) (New Haven: Yale University Press, 1969) was to show that none of the processes of social ordering he identified existed in a Platonic form.

The remaining third-party process—the managerial process—is that one associates with essentially allocative decisions such as the awarding of television licenses, or rule-making hearings. Even though input from affected parties is usually sought, all acknowledge that the ultimate decision will be most responsive to policy considerations.

As for party-party decisionmaking processes there are also three archetypes: social order resulting from the tacit accommodation of conflicting interest (or custom); social ordering resulting from explicit contract; and social ordering resulting from recourse by disputing parties to a third party to help them come to an agreement or a resolution of their disagreement (mediation). The most important thing to note about this range of alternatives is that mediation and its variants such as conciliation do not involve the direct imposition of a settlement on the parties. They remain processes in which the ultimate decision is that of the parties.

Normally one does not think of custom or contract as dispute resolution processes. Yet often the decision to “lump it” is taken on the basis of comity or reciprocity: the expectation, in a long term relationship, that down the road in a new dispute the other party will accede to one’s wishes. As for contract, our legal system expressly recognizes its role in civil disputing: settlement agreements are nothing more than the contractual resolution of a civil dispute. In both these cases, there appear to be no *a priori* logical limits on the kinds of conflicts amenable to them. Mediation and its analogues are the most interesting party-party processes. Where disagreement arises in the context of an ongoing relationship—personal or business—in which the continuation of the relationship is the highest-order value, mediation rather than any form of adjudication appears to be the optimal ordering process. By contrast, if the disagreement is not one that is ultimately amenable to contractual settlement, mediation is unlikely to be a successful alternative to an imposed solution.

The possibilities of decision through institutional rule are almost endless. Three will be mentioned here: auctions (that is, processes where an outcome is determined solely on the basis of who is willing to invest most resources in achieving the designed end); voting (that is, processes where there is no necessary rationality to the motivation of individual actors, but order results only from the tallying of their preferences); deliberate resort to chance (that is, where there are no obvious criteria for decision, where third-party decision processes are costly and inefficient, and where parties agree between or among themselves that everything is *ceteris paribus* and that any neutral decisionmaking process will do). What is noteworthy about each of the above processes is that they can still be deployed effectively when a dispute involves more than two persons.

Other examples will give a sense of potential scope of the various possibilities for institutional-rule decision processes. "Give up your place to the elderly" and "women and children first" are traditional rather simple decisionmaking principles that not so long ago were simply accepted as appropriate in a wide variety of circumstances. Even today much potential conflict is resolved by rules of thumb such as "keep to the right" or "first come, first served". More complexly, one could imagine the following technique for deciding a dispute between, say two siblings, over how to split a chocolate bar: "older cuts, younger gets first pick."

It is not the point of the above observations to go into great detail as to the forms, limits and substantive content of each of these processes. The object is more limited. It is, first, to show that an analysis of the type of issue to be decided can suggest a number of institutional processes besides adjudication. Of course, such an analysis does not itself provide any automatically applicable criteria either for deciding whether or not courts (and judges) might be asked to undertake processes which are not classical adjudication, or for deciding when decisionmakers other than courts (and judges) might be asked to undertake adjudications.

Secondly, the purpose of this analysis is to suggest that sometimes all that prevents an effective, efficient and just resolution of a civil dispute by one of these non-adjudicative processes is a prior decision by the legislature as to the manner of its formulation. That is, this analysis does not presume that certain kinds of social situation can only be understood as involving disputes of one or the other kind. In fact, it is becoming increasingly frequent for legislatures to transform legal entitlements which were previously cast in the manner of claims of right that could be adjudicated into more open-ended policy determinations for which a consultative or managerial process is a preferable dispute-settlement technique.

The conclusions to be drawn from the exercise of deriving principled criteria for allocating civil disputes on the basis of how the particular conflict is structured are not encouraging. Legal process analysis is like a logical syllogism. It will provide guidance as to what possible conclusions may be drawn once the major and minor premises have been established. But it does not speak to how the legislature should determine what content to pour into these premises.<sup>150</sup> In respect of existing allocations of civil disputes it does, however, provide a limited evaluative framework.

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<sup>150</sup> Nevertheless, for one attempt to develop these allocational principles, see R. Baruch-Bush, "Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles and Process Choice" [1984] *Wisconsin Law Review* 893.



Legal process analysis will permit the identification of various claims and entitlements currently allocated to the courts for decision that, as currently formulated, do not respond to the fundamental logic of adjudication (for example, custody hearings and commercial reorganizations). Such an exercise can then serve as a preliminary to asking whether, this institutional dissonance notwithstanding, these disputes should continue to be decided by judges through the ordinary judicial process, or even by judges through some other process.

Concomitantly, legal process analysis will permit the identification of claims and entitlements not currently allocated to the courts for decision that do respond to the fundamental logic of adjudication (for example, disciplinary hearings of self-regulating professions). Again, such an exercise can then serve as a preliminary to asking whether these disputes should in fact be allocated (or reallocated) to the courts. But, this type of analysis does not, and cannot, answer the question whether the theoretical efficiencies and inefficiencies it suggests actually exist; it cannot, moreover, guide the legislature in deciding whether, notwithstanding any such inefficiencies, certain disputes should still be allocated to any particular dispute resolution institution.

### 38. DETERMINING THE RELATIVE IMPORTANCE OF DISPUTES

The second type of principled approach to streaming different kinds of conflicts into non-judicial dispute-settlement institutions is to adopt an allocation methodology which seeks to determine the relative importance of different kinds of disputes.<sup>151</sup> This is a task of enormous normative complexity.<sup>152</sup> It requires, at the outset, the construction of a complex analytical grid by means of which various types of dispute-resolution processes are lexically ranked. It would, to take one possible example of a ranking scheme—that which is implicit in Ontario's current dispute resolution system—oblige the legislature to decide not only that the full-blown judicial process before the Ontario Court, (General Division) is the *nec plus ultra* of adjudication, and that formal mediation before a provincially certified mediator is the *nec plus ultra* of mediation, but also that judicial adjudication is a preferable process to formal mediation.

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<sup>151</sup> Once again, S. Goldberg, E. Green and F. Sander, *Dispute Resolution* (Boston: Little Brown, 1985) suggest a model for classifying disputes. They propose six criteria for characterizing disputes which, although more subtle than those usually implicitly deployed by commentators, are nevertheless highly reductionist.

<sup>152</sup> I have attempted, in allegorical form, to illustrate the variety of (largely incommensurable) factors that enter into any such calculations. See R.A. Macdonald, "Office Politics" (1990), 40 *University of Toronto Law Journal* 419.

Such a allocation process also requires a mechanism for evaluating (or pricing) different types of disputes. It would, for example, presume that different types of disputes could be assigned different point values to reflect their relative importance. Access to the different dispute settlement processes (and the distribution of disputes between them) would then be allocated according to the relative “importance” of the dispute, and the relative “ranking” of the process in question.

Obviously, there are substantial problems with such a system. Most notably, it assumes the optimality of dispute resolution before the Ontario Court (General Division) over the entire range of social and interpersonal conflict—a highly dubious proposition. In addition, it assumes that the relative ranking of other processes of dispute settlement can be established without much difficulty. Further, it assumes that the legislature will be capable of deciding the criteria by which points are awarded to different kinds of disputes. Finally, it assumes the commensurability of the different categories within which these points are distributed (that is, it assumes that distinctions of relative value based on who are the plaintiff and defendant can be measured along the same dimension as distinctions of relative value based on what kind of legal problem is presented for resolution). Notwithstanding these difficulties such an approach would not be entirely novel. The Common Law already knows of several types of graded distinctions which can be understood as implicit points allocation schemes. Three examples will suffice to show their variety.

Take the field of limitation periods. Presumably, over a period of several centuries the courts and the legislature have come to the conclusion that the limitation period for bringing lawsuits should not be identical in all cases. On the basis of existing legislation, one could deduce, for example, that claims in respect of real estate are more valuable than those respecting personalty; or that certain types of personal injuries claims should be protected more than certain types of contract claims; or that certain types of filiation or civil status claims are so important that they should always (or never) be open to challenge; or that claims against municipalities and the government are so troubling to the social order that the limitation period for bringing a lawsuit should be extremely short. Sometimes one can detect principle at work in the fixing of such periods. But with procedural decisions like that preventing a limitation period from running until a child is no longer a minor, or until the damage caused by an accident begins to reveal itself, most issues of principle find themselves accommodated in the design of the system, rather than in the fixing of the actual length of the limitation period.

A similar type of *a priori* policy decision by which decisions are made on the basis of an implicit points allocation scheme can be found in the regime for allocating voting rights in respect of bankruptcy proposals. Certain categories of

creditors are grouped together, and their voting rights are determined by the value of their claims. For some purposes the most important criterion is a creditor's status as a secured, preferred or unsecured creditor; for other purposes the most important criterion is the value of the claim provable in the bankruptcy. Here the design of the system not only explicitly awards entitlements on a points basis, but it apparently accommodates incommensurable evaluative principles.

One of the most complex points systems for attempting to make policy decisions on the basis of incommensurable variables is that which informs immigration policy. Factors as diverse as marital status, wealth, education, occupation, age, the presence of children already resident in Canada, among others, are consolidated together by means of a relative points system that ensures the admissibility of certain applicants on this basis alone. Of course, when examined closely, each of these schemes seems to be shot through with arbitrary standards, dubious distinctions and discretionary decisionmaking. Yet it would be easy to demonstrate that each is a fairer and more consistent method for allocating a resource than that now deployed by the Supreme Court of Canada is deciding whether or not to grant leave to appeal.

Given these precedents within the existing legal system it is difficult to claim that allocation of entitlements on a points basis is foreign to the logic of the Common law. In other words, there can be no objection in principle to a points scheme for distributing civil disputes as between different courts (for example, those with Cadillac procedures and those with expedited procedures such as the small claims court or a commercial contract court), or as between courts and other tribunals, or as between public and private decision-making bodies.

To give a sense of how such a scheme might possibly work, the following (admittedly rudimentary) hypothesis is offered. As a first step, one would have to develop a grid, as in the immigration system, in which all the relevant criteria appear. These presumably would be those criteria noted in the previous section by which different kinds of civil disputes could be classified. Then variable points would be allocated to different kinds of disputes within in category, and an overall ranking of dispute-resolution institutions established.

Assume that a litigant needs 200 points in order to have a civil dispute streamed to the Ontario Court General Division. Assume also the following hypothetical price list.

- (i) Up to 33 points could be allocated on the basis of parties to the dispute: 20 points if the plaintiff or defendant is an infant; 15 points if the plaintiff is a physical person; 10 points if the defendant is a physical person; 5 points if the defendant is a corporation; 0 points if the plaintiff is a corporation.



- (ii) Up to 33 points could be awarded on the basis of the nature of the claim: 20 points if it is a claim relating to real estate; 15 if it is a tenant's claim or a consumer claim; 10 points if it is a personal injury claim; and so on.
- (iii) Up to 33 points could be awarded on the basis of the amount in dispute: 20 points if the dispute is worth more than \$1,000,000; 15 points for disputes worth between \$100,000 and \$1,000,000; 10 points for disputes between \$10,000 and \$100,000; 5 points for disputes up to \$10,000.

The same process of relative valuation could be continued in respect of the legal issue involved, the remedy sought, the place where the cause of action arose, or any other axis of classification. It might even be applied to purely circumstantial or administrative factors such as the number of hearing days required, the number of months since the lawsuit was filed, and the number of cases of that nature filed within the previous twelve months.

Such a proposal may seem, at first blush, to be unworkable. But, in fact, it is often criteria of this type (and their combination by means of a relative point system) that are implicitly in the minds of those who propose streaming civil disputes. To take one small example as an illustration, one might ask why is it that many commentators think construction lien cases should not be brought before the Ontario Court General Division. Certainly factors such as factual complexity but poverty of legal principle, volume of cases filed, relatively small amounts often in dispute, and the use of the civil justice process as a surrogate for contractual ordering or for bankruptcy workouts are among the reasons advanced. Each of these incommensurables is, on its own, probably insufficient to suggest the allocation of construction lien cases to dispute-resolution institutions other than courts. Taken together, however, they point in that direction. In other words, as long as the points process remains relatively implicit, and as long as it is applied on an *ad hoc* basis to certain problems of civil disputing as they arise, this model of allocation does not appear either mechanistic or unreasonable.

However, once the various types of principled criteria by which streaming decisions might be taken are made explicit, and once they are applied across the entire range of civil disputing, the complexity of the allocative task is revealed. To begin, it is almost impossible to assign, on a completely principled basis, meaningful weights to the criteria identified. Intuitions and the counsel of experience are usually what guides these decisions of relative value.

What is more, the hypothetical example illustrates that the relative ordering of these criteria is a highly political (in the best sense of that term) decision: why

should lawsuits between natural persons necessarily be given a more privileged status than lawsuits between corporations or between corporations and trade unions, for example? Third, while a points system is workable to assign disputes among authorities performing the same basic types of task—adjudication on the one hand, or mediation on the other, it is less satisfactory as a means to distribute disputes as between different decisionmaking processes: the criteria of relative valuation for different processes are not necessarily commensurable.

Finally, to allocate civil disputes to different dispute-settlement institutions on a points basis that relates to the entire range of factors canvassed above, means that one can never know before what forum a lawsuit should be brought prior to all the various elements of the conflict having crystallized: it would presuppose, that is, a central registry of all litigation (in itself no bad thing), in which plaintiffs and defendants would be required to file a claim indicating the precise nature of their proposed lawsuit. Once the claim is fully developed, of course, an official such as a civil disputes registrar, would then allocate the lawsuit on the basis of whatever points formula the legislature had mandated. But, and by way of counterpoint, the formality of a full-blown points system would not facilitate private or informal dispute settlement. Quite the reverse.

Admittedly, the elaboration of a multi-dimensional civil disputes points system reflects the rationalistic spirit carried to the extreme. Nevertheless, something resembling the above analytical framework is probably the only way to develop and to keep into relative perspective the full range of criteria that should guide dispute allocation schemes. The task ultimately confronting the Civil Justice Review is, therefore, to develop an inventory of differentiating categories that are thought to be most relevant to assessing different types of civil disputes, and within each of the identified categories, to suggest the kinds of factors that would argue for allocation to one or the other type of dispute-settlement institution.

### 39. ALLOCATION ON THE BASIS OF CONSENT

A third general approach to the allocation of civil disputes among different dispute-settlement bodies on the basis of principle is radically different from the previous two. For rather than presupposing that there is an *a priori* logic to the different decisionmaking criteria that can be deployed, it relies primarily on the agreement of the parties to a civil dispute. In other words, even though the legislature may propose a range of different dispute settlement mechanisms, and may elaborate a series of criteria for classifying civil disputes, it would not itself take the decision as to how institution and process should be matched.

To some degree, this type of consensual process for dispute allocation now exists in Ontario. For example, as previously noted, with the exception of certain matters involving questions of civil status—marriage, divorce, filiation, adoption, child custody, civil commitment, and so on—litigants and potential litigants can always privately settle any civil dispute, before, during or after judgment. Moreover, except in the same types of cases, they can also opt to have any dispute that has arisen between them determined by a third person acting as an arbitrator. Even more radically, and again subject to the same limitations, they could decide between themselves to flip a coin. That is, short of physical violence or duelling, the law now permits disputing parties to take almost any approach they choose to resolving or channelling their conflict. There is no particular reason why modifications to the institutions of civil disputing of the sort proposed here should in any way change existing rules of public policy for determining which kinds of legal dispute must be brought to court and which may be settled by consent of the disputants.<sup>153</sup>

So much for the question whether, once a dispute or conflict has arisen, parties may agree to an alternative process of dispute resolution. For present purposes, there are three further issues that merit discussion. To begin, if the legislature develops a system of public alternatives to the judicial system, there ought, in principle to be no reason why potential disputants should not be permitted to select one of these alternatives by preference to a private dispute-settlement process of their own choice. This being the case, the legislature will also have to develop a series of policies by which it decides (i) what disputes must be brought to each of these new institutions; (ii) what disputes may not be brought before them; and (iii) the range of incentives (cost, delay, remedy, enforcement) it will put in place to encourage, in all other cases, disputants to select one or the other alternative.

This third idea leads to an ancillary question. How, and in what cases, ought legislature to arrange aspects of the civil justice system so as to encourage potential litigants to opt out of the ordinary court process? In other words, the decision to settle a dispute by private agreement or by some other non-judicial process might be stimulated by structural decisions of various descriptions. Assume for example, that certain classes of disputants were required to pay the full cost of a trial before the Ontario Court (General Division). This would constitute a powerful incentive to seek out some other dispute-settlement

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<sup>153</sup> There are, of course, strong arguments of public policy in favour of requiring the adjudication of disputes. See, for example, J. Resnick, "Failing Faith: Adjudicative procedure in Decline" (1986) 53 *University of Chicago Law Review* 494; and J. Resnick, "Managerial Judges" (1982) 96 *Harvard Law Review* 374. Most of these arguments, however, speak to the role of the judge and the need to insulate the judge from the kinds of constraints that flow from attempting to broker the parties to a settlement. They do not necessarily argue for requiring all human disagreement to be decided by a judicial process.



institution. Presumably, the overall list of criteria to be considered by the legislature in making choices about which disputes to channel in this manner will closely track that just suggested for allocating disputes on a points basis.

Lastly, should the role of the state should be limited to identifying those cases where *ex post facto* private settlement is not to be permitted, or whether it should extend to identifying those cases where *ex post facto* private settlement must be undertaken? Strictly speaking, when non-judicial processes are imposed, this is no longer a situation where the choice of dispute settlement institution is made on the basis of the agreement of disputants. But its close approximation to *ex post facto* consensual arbitration argues for a brief discussion at this point.

Once again, it is to be noted that the current system of civil justice in Ontario contains examples of disputes where parties are obliged to take their conflicts to private arbitration. The scheme by which grievances under collective agreements are arbitrated is the most well-known example of compulsory private adjudication. There is, it follows, no reason of principle why the Parliament of Ontario could not extend such a scheme to analogous disputes where parties are in long-term contractual or proximate relationships. Without attempting to prejudge the issue one might think that landlord-tenant disputes, neighbourhood relationships and boundary disputes, and construction disputes are other likely candidates for compulsory private arbitration.

If *ex post facto* consent to private dispute resolution does not seem to be particularly problematic, other aspects of *forum* shopping by consent raise more difficult issues. First among these is whether, and when, parties should be permitted to agree in advance to submit future disputes to a particular dispute settlement process or forum. This is an entirely different question from asking when the state should make such determinations. Prior consent by potential disputants typically presupposes the existence of a contract containing an arbitration clause (a *clause compromissoire*): there could never be a question of an ordinary tort claim, or a restitutionary claim, or a claim arising out of a succession, being the subject of a specific *a priori* private dispute settlement agreement.

It is, however, possible to envision situations where the legislature might be prepared to tolerate such clauses in private *inter vivos* trust agreement or in wills. This is not to say that tort claims may never be the subject of an *a priori* arbitration agreement. For example, two or more parties likely to have long term relationships (be these based in contract or based on neighbourship) might well agree that they will submit any future disputes among themselves—including tort claims—to arbitration or another dispute settlement process. But, it is to be noted that even though the agreement is not to arbitrate a contract dispute, the parties are, nonetheless, relying on contract to allocate the potential conflict. A similar

idea lies behind agreements between the future heirs of a person not yet deceased that any future dispute about their successorial entitlement will be submitted to arbitration, rather than to the courts.

The possibility of arbitration or other dispute-settlement agreements raises a number of questions of public policy. The most important is whether there are certain kinds of life situations currently regulated by the civil law where persons should not be permitted to contract out of the ordinary judicial dispute-resolution process. Already, in examining *ex post facto* alternative dispute resolution clauses a range of public policy considerations—primarily involving questions of status—were mooted. But when *a priori* agreements are in issue one might wish to cast the net wider. The question is not only whether parties should be permitted to choose among public or private dispute-resolution institutions, but whether they might even be permitted to renounce in advance their right to pursue a legal action for breach of contract. The issue could also be raised in respect of an *a priori* renunciation of tort claims against a given potential tortfeasor.

Consider also successorial disputes. These have always been subject to private settlement after the succession opens, providing all heirs agree. But would a like principle permit future heirs (testate or intestate) to agree to submit potential disputes about their entitlements, or any other matter respecting the succession (such as the scope of any dependent's relief claim they might make) to private dispute-resolution? Would it permit a testator or testatrix from requiring any beneficiaries under the will to submit any challenges to its validity or to their entitlement under it to private dispute-resolution? The broad range of possible situations that could be subject to *a priori* agreements governing private dispute settlement suggests that any legislative choices about either simply permitting, or actually providing incentives for, these alternatives should be made on a sectorial basis: taking the lead from existing rules that require disputes about status to be brought before the courts, the legislature might well decide that matters involving the family or successions can only be decided by publicly-managed processes.

A second issue of public policy is whether there are certain contractual agreements where no *a priori* consensual arbitration should be permitted even if *ex post facto* private dispute settlement is permitted? One might think, for example, that certain situations involving adhesion contracts, or a variety of consumer contracts such as those covered by the consumer protection act, employment contracts, residential tenancies, insurance contracts and so on, involving a gross disproportion in bargaining power between the parties would be types of agreements where access to the courts should be maintained. On the other hand, is it private dispute resolution *per se* that is problematic, or rather the fear that the same gross disproportion in bargaining power might lead to dispute-

settlement terms unfairly favourable to one party? In other words, there may be very few cases involving equal bargaining power between co-contractants (or deemed equal bargaining power—as in the case of commercial contracts) where it makes sense to impose restrictions on *a priori* private dispute settlement agreements above and beyond those applicable to *ex post facto* private dispute settlement agreements.

Consideration of the potential abuse that might result from private dispute-settlement clauses in cases of unequal bargaining power leads directly to the third general issue: are there certain kinds of disputes where contractual arbitration (or other dispute settlement process) clauses should be permitted, but only if the dispute settlement process in question meets certain minimum standards of transparency, independence, and procedural due process? Imagine, for example, that a statute were enacted that established a model dispute-settlement process replicating many of the procedural and decision-maker independence guarantees currently associated with judicial adjudication. In such cases, one might well permit contractual privative clauses excluding judicial jurisdiction even in those situations that reflect grossly disproportionate bargaining power between the parties.

The mention of privative clauses raises a fourth general concern about private *a priori* private dispute resolution clauses. Are there certain kinds of disputes where contractual arbitration (or other forms of private dispute resolution) should be permitted only if it also gives rise to a full appeal on the merits to a court? Normally the third and the fourth considerations would be cumulative. Certain types of cases where private dispute resolution clauses are permitted are nevertheless so important that the legislature should not only provide a model for the decision-making process, but should, in addition, provide for a full right of appeal. But this need not be the case. One can imagine that in certain cases one might want to give the parties the maximum of flexibility in designing a dispute settlement procedure, but nevertheless ensure a full appeal on the merits (and not just jurisdictional review by means of judicial review). Major commercial contracts involving large sums of money could well be an example of this type of situation.

A final range of issues that must be considered whenever allocation of disputes to private decisionmakers by consent mooted, is its mirror image. Is it possible to set up a system whereby parties whose disputes have been legislatively allocated to a private dispute settlement *forum* may opt back into one of the diverse public decisionmaking processes by contract, or whereby parties whose dispute has been assigned to one of the public non-judicial *fora* may opt back into the ordinary court system? For example, might parties who would be otherwise excluded from the Ontario Court (General Division) be



nevertheless permitted, by pre-existing contractual arrangement or by *post*-dispute agreement, to have their dispute heard by the court?

This question brings several considerations to the fore, not the least of which is that of cost. If parties are permitted to opt into the formal judicial process, should they then be required to pay the full cost (court time, administrative costs, judicial salary) for the hearing they select? In Ontario it is now the case that parties agree to have their dispute heard by a “rent-a-judge” process (occasionally where the judge in question is a retired justice of the ordinary courts). Is there a policy reason why they should not also be able to rent a sitting judge of one of the Ontario courts? And if so, should the process be under the control of the courts themselves: for example, should litigants be entitled, as in a purely private arbitration, to select the judge before whom they wish to proceed, or should they simply be assigned a judge from a general roster? Again, does the integrity of the judicial system require that once a decision to opt back into the system is taken, parties must follow the regular judicial process in all of its detail, or might they constitute the judge an arbitrator *ex aequo et bono* or relieve her or him from strictly following the rules of civil evidence?

The streaming of civil disputes on the basis of the consent of the parties actually has a long pedigree in the common law tradition. Whether it appears in one of its perverse forms—jurisdictional *forum* shopping—or one of its benign forms—the choice of contractual arbitration over judicial adjudication, streaming by consent is a central theme of the development of the law. Indeed, only since the *Judicature Acts* of the late 19th century have the various courts—King’s (or Queen’s) Bench, Chancery, mercantile courts, ecclesiastical courts, admiralty—not been in open competition for litigant business. As much as anything, consideration of alternative dispute resolution is the late-20th century version of the idea that parties should have a measure of choice in deciding where to have their disputes decided.

Only in rare circumstances, the above discussion suggests, should the legislature actually insist that a civil dispute be processed in a particular institution. Only in limited cases should arbitration and like contractual clauses be subject to judicial review. And in all other cases, the legislature should not be reluctant to deploy various procedural incentives—costs rules, filing fees, keeping separate civil roles for different kinds of disputes and allocating fewer judges to these roles, etc.—to influence the streaming choices of individual litigants.

#### 40. *EX POST FACTO* SUPERVISION OF NON-JUDICIAL DISPUTE SETTLEMENT MECHANISMS

Regardless of whether a non-judicial (or private) decision-maker has jurisdiction over a dispute because parties to it have chosen that mode of proceeding or because the legislature has allocated the kind of dispute in question to it, two main issues relating to the integrity of the decision-making process arise: by what means are the non-judicial decisionmakers in question themselves to be certified (if at all)? and what mechanisms should be put in place to supervise the decisions of non-judicial decisionmakers? Many of the points about to be canvassed apply equally to public and to private decisionmakers. Some, however, only apply to private decisionmakers. Still others really only enter into play where recourse to a private decision-maker is legislatively mandated, rather than consensually agreed upon.

The model of administrative tribunals and inferior courts provides a first approximation of the kinds of supervision that can be envisioned for private decisionmakers.<sup>154</sup> Indeed, the mechanics of judicial review of domestic tribunals and statutorily mandated arbitrations is the private analogue to public law supervision. This supervision can be of two main types: appeal or judicial review. Presumably the same types of considerations that influence the legislature is determining when appeals (whether as of right or with leave, whether on questions of law or mixed questions of law and fact, whether on a record or by way of hearing *de novo*) should be permitted from administrative tribunals should be developed in respect of private dispute settlement institutions. As for judicial review, there is an enormous body of learning in administrative law about errors of fact, law, and jurisdiction. Review can be had on substantive or procedural (natural justice and procedural fairness) grounds; review can be hedged by objective privative clauses (be these finality clauses or no-*certiorari* clauses) or by wide discretionary subjective grants of decision-making power. The administrative law model is, consequently, likely to be a useful starting point for considering these questions of curial supervision.

Nevertheless, as the literature in connection with judicial review of administrative action clearly points out, the idea of judicial review of inferior tribunals is far from unproblematic. All appeals involve cost and delay. Extramural appeals involve increased cost and delay because they invariably require

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<sup>154</sup> In the discussion that follows I have been strongly influenced by the work of Harry Arthurs in administrative law and legal pluralism. See notably, H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1977) 17 *Osgoode Hall Law Journal* 1; and H.W. Arthurs, *Without the Law* (Toronto: University of Toronto Press, 1985).

parties to reformulate the issue in dispute. It is not necessary to rehearse here the difficulties that arise from the projection by courts exercising jurisdiction in judicial review of the assumptions and substantive conceptual apparatus of private law decisionmaking onto administrative decisionmakers.

Suffice it to say that the same questions of expertise, non-rights based adjudication, deference to fact finding, and so on, will arise. From a civil disputing perspective there are two main concerns: should there be a minimum standard of judicial control imposed whenever private decision-makers are able to file their awards with the court in order to open the door to ordinary execution processes? and should there be a minimum standard of judicial control should be imposed whenever the legislature has taken the decision that parties must submit their disputes to private decision-makers?

These considerations suggest a number of avenues for legislative action. The legislature might well decide that a general statute analogous to the *Judicial Review Procedure Act* should be enacted so as to permit decisions of private decisionmakers to be reviewed by the courts. Such a statute would have to specify a number of matters: the types of decisionmaker subject to review; the grounds of review (error of fact, error of law, error of jurisdiction, and so on) permitted in specific cases; the remedies available to aggrieved parties (decision on the merits, remission to the initial decisionmaker, remission to another similarly situated decisionmaker, and so on). Just as is currently the case with administrative decisionmaking, however, the chances are slender that a sufficiently nuanced generic statute could be developed to structure the exercise of judicial review of private decisionmaking in a manner satisfactory to litigants.

#### 41. *EX ANTE* CERTIFICATION OF NON-JUDICIAL DISPUTE SETTLEMENT INSTITUTIONS

As for *ex ante* certification of private decisionmaking institutions themselves, slightly different interests come into play. By analogy to the rules of natural justice, one can consider this question from the perspective of the decisionmaker (what principles similar to the idea of *nemo iudex in causa sua debet esse* should be adopted?), or from the perspective of the decisionmaking process (what principles similar to the idea of *audi alteram partem* should be required?).

Where the legislature mandates private dispute settlement mechanisms—be these through adjudication, a managerial process, mediation, or whatever—the question of certification of decisionmakers arises in its most acute form. Should a roster of qualified decisionmakers be kept so that parties will have to select from among these? The argument in favour of a roster is that it permits the legislature to impose a minimum of control over the education, duties and



independence of the decisionmakers in question. Thus, for example, the legislature may wish to establish a multi-member arbitration in which the parties each select one member, who then together select a presiding member from a list of certified candidates.

But all certification procedures are time-consuming and costly. If a roster is developed, would the legislature then be required to give the qualified candidates a degree of immunity from suit? Would it warrant their competence? What types of controls—examination, periodic performance review, and so on—would be required?

A different mix of factors comes into play where the parties themselves select the type of decisionmaking process that they prefer. If they can choose the process, ought they not also to have the ability to select whomever they wish as decisionmaker? Yet this argument for permitting the parties an absolute freedom in selecting the decisionmaker loses much of its force in cases where one party is able, at the time of contracting for example, to impose a particular decisionmaker on the other. In such cases, the legislature may wish to limit contractual determinations of decisionmakers to identifying a group of potential arbitrators—say, for example, certified members of the American Arbitration Association. By contrast, if the parties are of relatively equal bargaining power, or are deemed to be of relatively equal power, it may be most efficient to permit them to select a named individual to decide future disputes at the moment they enter into a contract.

Where a private decisionmaker is selected by consent only after a dispute has arisen, a greater latitude might be permitted, although should the agreement between the parties merely stipulate that a private arbitrator shall be named, some mechanism by which an independent third-party (perhaps the Chief Justice of the Ontario Court (General Division), or a delegate) chooses the particular decisionmaker. In all events, once the legislative decision is taken to permit parties to irrevocably contract for non-judicial decisionmaking, or to impose non-judicial private decisionmaking on parties, it is necessary to provide for a fall-back mechanism, whereby the court retains authority to decide the dispute if the litigants are unable to agree.

Complementary to certification of decisionmakers is the idea of certification of process. At least two different approaches to this question may be taken. One possibility is for the legislature to enact a series of model procedures—governing adjudication, managerial decisions, voting procedures, mediation, and so on. This in fact is the technique followed for administrative agencies exercising statutory powers of decision under the *Statutory Powers Procedure Act*. While that statute sets out minimum standards governing the right to be heard, the right to cross-examine, the right to reasons, to counsel, and the like in respect of quasi-adjudi-

cations, there is no reason why a similar set of procedural forms could not be enacted for each and every possible process of decisionmaking that is legislatively mandated or authorized.<sup>155</sup> If such an approach were adopted, parties would be required, at the time of contracting an arbitration clause, to specify the procedural model that they wish to govern their dispute.

Another approach would be for the legislature to allow the parties themselves a measure of freedom to determine the procedural model to be followed, even in cases where private dispute-settlement is legislatively mandated. Thus, for example, the legislature might permit parties to adopt the arbitration rules of the American Society of Arbitrators, or those procedural rules of the American Society of Family Mediators. That is, there is no necessary reason why the range of decisionmaking models to be followed in order to obtain certification of the process should be those decided in advance by the legislature. Once again, the relative bargaining power of the parties to the dispute will likely be the principal factor influencing the extent to which the legislature seeks to specify procedural models.

The notions of process and decisionmaker certification are not new to the Common law. But when they are projected into the realm of private decisionmaking institutions at least one new issue emerges. What is the rationale for governmental regulation of these questions once it has been determined that parties should be freely permitted to opt out of the court system? That is, where non-judicial decisionmaking is not legislatively imposed, why should the market not determine which purveyors or which services will survive?

Behind these questions lie two apprehensions, each pulling in an opposite direction. One is that the legislature will be so committed to the decisionmaking model of Common law adjudication that it will unnecessarily restrict the freedom of parties to tailor-make a procedure to suit their purposes, and will simply replicate judicial adjudication in the private sphere. This argues for legislative deference to contractual ordering. The other apprehension is that there are public values to peaceful, public dispute settlement that could be compromised if the legislature were to tolerate procedural anarchy. This is the issue to which this Study now turns.

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<sup>155</sup> For an example of how such a process might work, see R.A. Macdonald, "Judicial Review and Procedural Fairness in Administrative Law" (1980) 25 *McGill Law Journal* 520; (1981) 26 *McGill Law Journal* 1.

## 42. OPENNESS, ACCOUNTABILITY AND CONSISTENCY

One of the principal reasons why issues of supervision and certification arise is because of a concern for openness, accountability and consistency in dispute-settlement processes. These concerns are, however, often overstated. That is, they are a legacy of atavisms about the judicial process which are sometimes not even honoured there. For example, there are many circumstances where parties agree to settle a dispute that has already been filed as a lawsuit and to keep the settlement private. Why should any different principle apply in cases where parties agree to submit a dispute to a non-judicial third-party? If parties may keep a two-party settlement confidential, why should they not be permitted to keep a third-party private decision confidential? In both cases the primary purpose of the dispute settlement process is to solve the dispute (*res judicata*).

Of course, where a particular form of non-judicial dispute resolution is imposed by the legislature there is a stronger case for compelling decisionmakers to publish reasons for decision and to make the process open to the public. Yet, the case for doing so is not absolute.<sup>156</sup> One might well begin with the hypothesis that either party should be entitled to ask for reasons from the decisionmaker, and that, unless one or the other (or both—depending on the value the legislature attaches to the particular issue in dispute) of the parties object, these reasons shall be made public. That is, whether or not the decision should also be put into the public domain to serve a *stare decisis* function should be, unless there are good reasons for the legislature to decide otherwise, left to the discretion of the parties. Indeed, it would do wonders to controlling the glut of first-instance judgments appearing in the law reports were a similar principle applied more generally to judicial decisions.

It would appear that similar conclusions should be reached in respect of the issue of accountability. To whom should the private decision-makers be primarily accountable? If the notion is that they should be just as publicly accountable as judges why is so much effort being expended on rethinking dispute settlement? All that needs to be accomplished is for the legislature to provide that certain parties must pay the full cost of civil disputing, and then use the money received from these plaintiffs to build more courthouses and appoint more judges. To put the point slightly differently, judges have a public function: they are paid from public resources; they have tenure, in principle, until age 75; they cannot decline to hear any case submitted to them on the basis that they would rather not (although they can decline for reasons of interest, apprehension of bias, and like reasons); they must (except in rare cases) preside over a hearing in public; and

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<sup>156</sup> See R.A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990) 3 *Canadian Journal of Administrative Law and Practice* 123.



their decisions, being paid for by the public and not by the parties to the case, are in the public domain.

No democratic society can function without a judiciary ultimately accountable to the general public. But no democratic society can function if all dispute resolution has to be undertaken in the public domain. Private dispute-settlement presupposes that accountability runs first to the parties, and this should be the case even where private processes are legislatively mandated.

Closely allied with the notion of accountability is that of consistency. A discussion paper on alternative mechanisms of civil dispute resolution is not the place to engage in an analysis of consistency in the judicial process. Suffice it to say that consistency is both a highly over-rated and a highly exaggerated phenomenon. Disparities in the two main types of judicial decisionmaking where quantifiable data is available—personal injury compensation and criminal sentencing—show just how variable judicial outcomes can be. What is more, as discussed earlier in this Study, the model of legal decisionmaking we associate with the Common law is a model of justification and not a model of discovery.

Legal consistency is invariably the consistency of argumentation and the consistency of justification. There has never been an empirical analysis of judicial consistency in terms of substantive outcomes of legal processes. In fact, the only simulations undertaken in the United States appear to indicate that little consistency either as to ultimate outcome or measure of remedy awarded can be expected even among trial judges drawn from the same bench. Here again, to envisage elaborate control mechanisms ostensibly to ensure a consistency of result in private decisionmaking is to adopt an unrealistic model of the possibilities civil dispute resolution. There is no independent justification for appellate review of private decision-makers on the basis that it produces consistency of outcome. As noted, appellate review should exist only where the importance of the dispute, or where (in the absence of *ex ante* certification of the process and the decisionmaker) there exists a strong possibility that one party will be able to corrupt a private dispute-settlement process in its favour.

The above paragraphs are not intended as a plea for non-judicial decisionmaking that is secret, unaccountable and inconsistent. It is rather a plea for reasonableness both in our understanding of how the ordinary judicial process functions, and in our expectations of non-judicial decisionmaking. We should not expect from these other processes and institutions for resolving civil disputes a standard of performance that we do not even expect from courts. Yet herein lies much of the difficulty in attempting to develop principled criteria for allocating disputes between various types of institution, and for maintaining the integrity of the entire system—public and private.

As long as we have idealized conceptions of judicial adjudication in our minds as the evaluative frame against which these alternatives are to be measured, they will invariably fail to meet the standard we set for them. But we must remember, first, that while the official judicial system functions remarkably well in practice, it does not function the way these idealized conceptualizations of it suggest. Second we must remember that very often the idea behind seeking alternatives to judicial adjudication is our belief that certain types of civil disputes have a particular character about them that do not make them suitable for judicial adjudication. Keeping these two points in mind ought to allow us to be more realistic in our assessment about what specific measures our legitimate desire for openness, accountability and consistency actually requires.

### 43. CO-ORDINATION OF CIVIL DISPUTING PROCESSES

A final issue that should be considered in any evaluation of the possibilities for streaming various types of disputes to different public and private decision-making bodies is that of co-ordination.<sup>157</sup> Major concerns of access to justice proponents in the United States have been the dispersal of official decisionmakers, the replication of systemic injustices out of the light of critical scrutiny, and the possibility of conflicts between the jurisprudence of different institutions.<sup>158</sup> Before the problems with such a system are discussed, it is worth examining how the notion of "one-stop process shopping", a model often advocated as a way of streamlining civil disputing might work.

With modern advances in technology, it is said that there is no reason that the official record of all civil litigation could not, in principle, be constituted electronically in a central registry. Any disputes not appearing on this register would have to be specially exempted: one might think, for example, of grievances filed under labour agreements, applications for rent review, claims filed under the workers compensation scheme, and so on. In the very development of a list of types of disputes that one would wish to see exempted

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<sup>157</sup> As soon as one undertakes a discussion of co-ordination, issues of legal pluralism come to the forefront. I have attempted to address the differences between what are called in this Study a "conflicts of laws" model of co-ordination and an "administrative law" model of co-ordination in R.A. Macdonald, "Les Vieilles Gardes" in J.-G. Belley, ed., *Le droit entre ordre et désordre* (Paris: Librairie générale de droit et de jurisprudence, 1994).

<sup>158</sup> For a representative set of critiques, directed primarily to mediation, see N. Vidmar, "Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance" (1987) 21 *Law and Society Review* 155; N. Vidmar, "An Assessment of Mediation in a Small Claims Court" (1985) 41 *Journal of Social Issues* 127; R. Delgado, et al "Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution" [1985] *Wisconsin Law Review* 1395.

from the central civil disputes register, one would get a good sense of the landscape of civil disputing in Ontario, and the kinds of claims that *prima facie* should be considered for streaming to a non-judicial (public or private) dispute settlement body.

Once these claims are electronically filed, the registrar would then be empowered, depending on the legislative decision or private agreement in issue to allocate the case to one or another of various decision-making *fora*, each of which would have its own computerized record keeping system. That is, these disputes could then be allocated according to a series of established criteria to various dispute settlement mechanisms. This type of process can be labelled the administrative law model of dispute allocation. Every dispute has its predetermined institutional forum. All disputes belong to one and only one such forum. And the courts, (or the courts' delegate—the registrar) keeps the system in balance. The system could be slightly modified so as to accommodate cases where the parties to a dispute themselves select an alternative decisionmaking procedure or forum. That is, they should be permitted to have the dossier transferred from one management system to another under the conditions outlined earlier.

Models for the transfer of dossiers from one system to another already exist in Quebec in respect of the transfer (at the request of a defendant who is a physical person) of cases necessarily commenced by corporate plaintiffs in the Civil Division of the Quebec Court to the Small Claims Division of the same court. The technology already exists, as the computerized registry established under the *Personal Property Security Act* attests, to establish a province-wide register of litigation on a centrally located, but remotely accessible basis. If such a system were combined with electronic data collection in respect of the principal objective features of a civil dispute, this would quickly allow the development of comparative statistics about case-loads, case-processing, settlement ratios and the effectiveness of the execution process.

The different Case Management Systems that presently exist in various North American jurisdictions demonstrate how little we really know about the factors that stimulate civil litigation, that control the progression of a case through the civil disputing process, and that ultimately lead to its settlement.<sup>159</sup> But these same systems are proving remarkably effective in generating information on all these questions. For this reason, regardless of how one comes to determine mechanisms for dispute allocation, there is a utility to establishing

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<sup>159</sup> The literature on caseflow management systems is also enormous. Moreover, there is a great variety of possible models. A good starting point is, however, M. Soloman and D. Sowerlat, *Caseflow Management in the Trial Court: Now and For the Future* (Chicago: American Bar Association, 1987).



procedures and mechanisms for requiring all civil disputes (except those specifically exempted from such registration) to be electronically registered in a central civil disputes register, whenever any legislatively mandated dispute-resolution process (be it judicial or non-judicial, be it public or private) is invoked, and whenever any consensual private dispute settlement process that will ultimately be filed with the registry for the purposes of obtaining a seizure and sale in execution is commenced.

It should not, however, be presupposed that co-ordination of civil disputing on such a model is an unmitigated good. The creation of systems for tracking certain kinds of disputes has its own incentives. Those who seek to conceal their disputes will develop alternative schemes; those who seek publicity for relatively minor disputes will be inclined to use the system for its public relations value. In addition, no system is going to be able to handle the vast range of human conflict, unless reporting controls are imposed. And the very exercise of requiring disputants to frame their dispute in a particular way in order to have it registered, already starts one down the road to formalization of conflict.

Finally, any systemic registration of disputes operates as an obstacle to the recharacterization and deformatization of civil disputes. Just as the West National Reporter System and its key numbers have structured categories of law in the United States, one can predict that office systems, tracking mechanisms and bibliographic research tools soon would be developed on the basis of the criteria driving the records system. Once a conflict is filed in a particular form, it is likely (just as with an ordinary lawsuit) to maintain that form until it is resolved. For this reason, it may be preferable to delay the formal registration of a civil dispute until the disputants themselves have taken a definitive procedural step—issued a writ, or otherwise invoked the authority of a recognized civil disputing institution.<sup>160</sup>

#### 44. THE LIMITS OF EXPERIENCE AND LOGIC: INTUITION AND THE POLITICS OF ALLOCATING OF CIVIL DISPUTES

The above paragraphs reveal that the development of strategies for allocating civil disputes between various public dispute resolution bodies, and as between public and private bodies, is an extremely difficult exercise. The reasons bear reiteration. First, we do not know exactly what is currently the state of civil disputing in Ontario. Second, we do not know exactly what is the problem with the system that we are trying to solve. Third, we do not know what perspective

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<sup>160</sup> Exactly these problems with civil justice statistics are explored by C. Beroujon and S. Bruxelles, "Règles juridiques, catégories statistiques et actions sociales" (1993) 25 *Droit et Société* 369.

to adopt in seeking solutions. Fourth, we do not know what our measurement criteria for deciding as between various alternatives should be. Fifth, we do not really know what these alternatives are. Sixth, we do not know how to distinguish between various types of civil dispute. Seventh, we do not know whether any decisions taken will have the desired effect, or whether they will simply change the patterns of civil disputing in perverse ways.

More tellingly, even were we able to gain a clear appreciation of the “landscape” of disputes, and even were we to decide our standards of measurement, and even were we to have a comprehensive inventory of processes, institutions and civil disputes, we would have advanced only a small way down the desired path. We would still have to undertake empirical analysis and measurement. Then, having done so, we would have to make policy judgments about what to do, not only on the basis of these theoretical models, but also on the basis of our predictions about how potential litigants would react to our proposals. In the final analysis, we are not even certain about the goals we seek to promote in dispute resolution as a social process.<sup>161</sup>

An entire academic discipline is devoted to the enterprise of predicting responses to legal change. Unfortunately, studies predicting the impact of cost-shifting, fee and financing rules are inconclusive.<sup>162</sup> We intuit that if the price of civil litigation becomes too high, potential litigants will seek alternatives. We intuit that agglomerating similar actions will enhance their vindication. We intuit that pre-paid legal insurance schemes will reduce litigation by facilitating planning. We intuit that compulsory mediation will make civil disputing more civil. All these intuitions are based, in some measure, on an economic analysis of individual motivation.

Yet at least one recent study indicates the difficulty of applying the assumptions of economic analysis to problems of legal ordering.<sup>163</sup> Another indicates that one of the primary motivations to certain kinds of litigation is how the disputants conceive their conflict.<sup>164</sup> Still another suggests that a key feature is the confidence that potential litigants have in the ability of the civil disputing

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<sup>161</sup> See R. Baruch-Bush, “Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments” (1989) 66 *Denver University Law Review* 335.

<sup>162</sup> See R. Prichard, “A Systemic Approach to Comparative Law: The Effect of Cost, Fee and Financing Rules on the Development of Substantive Law” (1988) 17 *Journal of Legal Studies* 451.

<sup>163</sup> See R.C. Ellickson, *Order Without Law* (Cambridge: Harvard University Press, 1991).

<sup>164</sup> See S.E. Merry, *Getting Justice and Getting Even* (Chicago: University of Chicago Press, 1990).

system to understand their dispute.<sup>165</sup> All these endeavours suggest that neither logic nor experience provides “answers” to the allocational question delegated to the Civil Justice Review.

And yet, allocational decisions have been taken in the past; and allocational decisions continue to be taken today. Ought the Civil Justice Review simply to throw up its hands in despair of making these allocational decisions more rational? In response, it is helpful to remember that other major decisions have been made on the basis of incomplete or questionable information. The rhetoric of reaction—futility, perversity and jeopardy—should not be permitted to blunt legislative intuition.<sup>166</sup> In other words, the best one can hope for is a policy decision that is not captured by a single constituency among those who have an identifiable interest in the outcome. Not surprisingly, the key to achieving such policy decisions is a healthy democratic process. Indeed, the integrity of the Civil Justice Review process is the best guarantee that the outcome of the process will be broadly effective in accomplishing its purposes.

## **CONCLUSION: RECASTING ONTARIO’S CIVIL JUSTICE SYSTEM**

### **45. BEYOND COST AND DELAY: FORMALITY AND INFORMALITY**

The previous sections of this Study have suggested that to ask how to make the civil justice system more economical, efficient and accessible is to ask, in effect, what one is trying to do with the civil law. At one level, one can conceive the civil law simply as a means of maintaining social peace and keeping social life going. This is the perspective of those who are professional participants in discussions about alternative dispute resolution: law is about trying to resolve disputes, and trying to provide institutions and rules to facilitate dispute avoidance.<sup>167</sup>

At another level, however, one can think about the role of the civil law in transforming patterns of human interaction: the civil law is about the way we

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<sup>165</sup> See R.A. Macdonald and S.C. McGuire, “For Whom the Court Toils: Lumping It and Stuffing It As Alternative Strategies for Dealing With Unresponsive Law” (unpublished, 1994).

<sup>166</sup> On these three strategies for resisting change see A. O. Hirschman, *The Rhetoric of Reaction* (Cambridge: Harvard University Press, 1991).

<sup>167</sup> For a thoughtful exposition of this traditional view, see L.L. Fuller, “Law As An Instrument of Social Control and Law As A Facilitation of Human Interaction” (1975) 1 *Brigham Young Law Review* 89.



construct, negotiate and dismantle social relationships. This is the perspective of those who have attempted to reconcile the goals of access to justice with the promise of alternative dispute resolution: law is about trying to democratise the exercise of social power, and attempting to equalize power imbalances within society.<sup>168</sup> If one understands the role of the civil law, if only in part, as being about either of the latter two questions, then one has to rethink if civil disputing should in fact be the only focus of the Civil Justice Review, and whether, more generally, it is even the best point of entry for examining questions about access to justice.

As good a way as any of addressing the point is to ask whether we really do believe that an efficient, expeditious and cheap official system of civil justice is the optimum condition for a society to achieve. Take the limiting case: a public adjudicative system that is costless to litigants, and where a trial will be held on demand. It might be predicted that if suing someone is made too easy, the lawsuit will become the equivalent of buying bubble gum. There will be no incentive to compromise or to settle disputes. There will also be no incentive not to provoke conflict. Admittedly, there are some commentators who are so enamoured with the vindication of legal rights that nothing short of compulsory civil litigation of all private disputes should be tolerated. Less polemically, a number of scholars argue that, far from there being a litigation explosion, there is not enough civil litigation in certain critical areas—especially professional malpractice, product liability, automobile and workplace safety, and denials of civil rights. But this vision of a society bonded together primarily by the contestation of interpersonal claims is far from universally shared.

A number of studies have demonstrated that there is a role for the cost of litigation to play as a meaningful disincentive to litigation. We already recognize the impact of the cost of litigation in our cost-shifting rules. Before one can make recommendations about the desirability of permitting lawyer advertising and contingency fees and eliminating cost-shifting rules one needs to know whether this will make lawsuits more likely, as experience in the United States suggests it might.

The general conclusion of scholars in the United States is that there can be no single right answer to how cost-shifting rules in civil litigation and the availability of contingency fee litigation should be deployed. Sometimes they

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<sup>168</sup> See especially, J. Handler, "Dependent People, the State, and the Modern-Post-Modern Search for the Dialogic Community" (1988) 35 *UCLA Law Review* 999; S. Silbey and A. Sarat, "Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject" (1989) 66 *Denver University Law Review* 437; G. Rocher, "L'emprise du droit" in F. Dumont, ed., *La société québécoise après 30 ans de changement* (Quebec: Institut québécois de recherche sur la culture, 1990) at 99.

produce a benefit; sometimes they encourage speculative litigation.<sup>169</sup> Similar observations can be made about delays. There is much literature on the salutary effect of forcing parties to wait before undertaking litigation, and having started a lawsuit, to cool off before pursuing it. Academic studies again conclude that there is no one model, but that the relative balance of advantage and disadvantage to delays depends on the kind of issue in dispute.<sup>170</sup>

The Civil Justice Review ought, therefore, to start by asking what are the different occasions where cost and delay might be a good thing. Presumably, the Interim Task Group is addressing this question within the framework of the current judicial system. But the Fundamental Issues Group ought to carry this inquiry further. In respect of the variety of mechanisms by which modern societies have come to deal with civil disputes, and in respect of the variety of civil disputes already legally recognized, under what conditions might something other than free and instantaneous dispute resolution be an optimal solution? Once possessed of such an inventory, the Fundamental Issues Group can begin to consider the allocational question.

This suggestion that there might be an optimal configuration of the dispute creation, formulation and resolution mechanisms of civil society leads directly to a consideration of goals besides the reduction of cost and delay that ought to drive the Civil Justice Review. In other words, the object of the present exercise is not simply or even principally to find mechanisms to overcome problems of cost and delay in the judicial process by minimizing the need for citizen recourse to courts and streaming civil disputes to more efficient alternatives. After all, a properly-managed interpersonal mediation in a family dispute such as a divorce can be just as (if not more) time-consuming and costly as ordinary judicial adjudication.

Nevertheless, to the extent that our conception of access to justice is cast in terms of State-managed dispute-resolution institutions, we are likely to see more law (and especially more judicial litigation) as the solution to law's failures. Consider why so many commentators feel that the principal failing of justice in Ontario society is unequal access to courts. The Quebec Task Force on Access to Justice found that a much more important failing (at least in the eyes of the general public) was unequal access to the legislative process to make law, and to those public offices (judiciary, public service, administrative agencies, legal professions) through which law is applied and enforced. If this finding also

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<sup>169</sup> See S. Shavell, "Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs" (1982) 11 *Journal of Legal Studies* 55.

<sup>170</sup> See Y.-M. Morissette, "Les lenteurs de la justice considérées sous un angle que les avantage" (1987) 33 *McGill Law Journal* 137.

applies in Ontario, civil disputing reform strategies intended to enhance access to justice should include not only promoting alternative dispute resolution, but also encouraging citizen development of social arrangements and competing normative systems which complement the system of official law.<sup>171</sup> In other words, processes of alternative dispute resolution (at least as conventionally understood) are only a part of the solution to problems of access to civil justice.

The most obvious example of the limits of conventional notions of alternative dispute resolution as a means for achieving access to justice can be seen in proposals for merely tinkering with adversarial adjudication. Numerous studies illustrate that in all litigation those who know how to use the system, invariably will turn it to their advantage, no matter how it is structured, and no matter whether the process be judicial adjudication or alternative dispute resolution by private arbitration.<sup>172</sup> As a result, it might be concluded that empowering decisionmakers to rebalance the process—perhaps by a more inquisitorial form of adjudication, by arbitration *ex aequo et bono*, and by judge-managed negotiation—will help overcome this inequity. To date, however, the evidence is inconclusive.<sup>173</sup>

Again, because they are less driven by procedural rules and fidelity to form over substance, it might be thought that dispute resolution mechanisms that do not depend on the adjudication of rights—for example, mediation and negotiation—will, all things considered, likely improve access to civil justice in Ontario. Unfortunately, what studies do exist cannot be marshalled in support of any such conclusion.<sup>174</sup>

These reflections point to a central paradox of all attempts to rethink institutions and processes of civil disputing. Most dispute resolution outside courts today takes place in relatively informal settings, following relatively informal procedures and with relatively informal structures of accountability. For this reason, behind much of the rhetoric of A.D.R. one can find informalist romanticism. But when alternatives to the judicial process are actually proposed

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<sup>171</sup> See D. Trubek, "Critical Moments in Access to Justice Theory: The Quest for the Empowered Self" in A.C. Hutchinson, *Access to Civil Justice* (Toronto: Carswell, 1989) at 107.

<sup>172</sup> See D. Black, *Sociological Justice* (Toronto: Oxford University Press, 1991).

<sup>173</sup> See, for example, the observations reported in M. Galanter and M. Cahill, "'Most Cases Settle': Judicial Promotion and Regulation of Settlements" (1994) 46 *Stanford Law Review* 1339.

<sup>174</sup> For a complete investigation of the matter, see J. Esser, "Evaluations of Dispute Processing: We Do Not Know What We Think And We Do Not Think What We Know" (1989) 66 *Denver University Law Review* 499.



in particular circumstances, much of this faith in informalism disappears. A recapitulation of ideas developed in section B of Part Two of this Study reveals the depth of the paradox.

The very exercise of developing taxonomies of different institutions and processes of dispute resolution is a formalistic and rationalizing endeavour. Concerns about *ex post facto* supervision of outcomes and *ex ante* certification of decision-makers and procedures are translated into structural solutions, usually on the administrative law model. The values of openness and accountability and consistency and the desire for co-ordination of diverse processes all presume both formality and systematization. In brief, however informalist the motives for dejudicialization, in practice, almost all proposals operate to replicate in non-judicial settings, the formalism of judicial adjudication that appears to be at the root of cost, delay, complexity and inaccessibility. For this reason, many now believe that more important the processes of alternative dispute resolution are processes of alternative dispute creation.<sup>175</sup>

#### 46. THE MEANING OF PREVENTATIVE LAW AS A SYMBOL OF CIVIL DISPUTING

Contemplating alternative processes of dispute creation—that is, providing an alternative account of social conflict and alternative institutions for recognizing and resolving it—is, of course, the project pursued by those who argue the case for preventative law.<sup>176</sup> This Study is not the place to explore the meaning of preventative law or to make the case for thinking about law preventatively as a way of improving the civil justice system in Ontario. Nevertheless, the general point advanced by proponents of preventative law merits brief statement.

Preventative law (like preventative medicine) is a symbol for an attitude towards the province and function of law, the role of legal professionals in managing human interaction, and the role of official institutions in processing interpersonal conflict. It is another way of asking what resources Ontario society now has available and is willing to deploy to identify, channel, and resolve these conflicts.

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<sup>175</sup> I have tried to develop this idea in a study evaluating the work of the Quebec Task Force. See R.A. Macdonald, "Theses on Access to Justice" (1992) 7 *Canadian Journal of Law and Society* 32.

<sup>176</sup> See generally, P. Noreau, *Droit préventif: le droit au-delà de la loi* (Montreal: Éditions Thémis, 1993).

Admittedly, the analogy to medicine is not exact. There is a consciously constructive and normative character to all law. Thus, while people do have bad health and social habits which can contribute to medical or human relations pathologies, and which, with counselling can be identified and overcome (at least partially), a workplace accident or a broken contract is not like heart disease. In particular cases, the preventative solution for heart disease may well be to reduce stress and the consumption of cholesterol and to avoid smoking. But the preventative solution to workplace accidents surely cannot be to stop working; nor can the preventative solution to breach of contract be to reduce the number of contracts one enters into. Rather, prevention lies in enhanced employee training and improvements to the conditions of work, on the one hand, and a more carefully thought out representation of the relationship between contracting parties that maintains the relationship in the face of aleatory and unforeseeable events, on the other.

However useful the preventative law metaphor may be as a way of asking jurists to focus their attention on aspects of law besides the resolution of conflict, it is ultimately unhelpful as a programme for action. Remedial law is not always just about getting justice—that is, fixing a problem without moral opprobrium. It can also be about getting even. This moral dimension sharply differentiates remedial law from remedial medicine. Both preventative law and remedial law are ways of thinking about roles and relationships, and about negotiating human interaction and interpersonal conflict.<sup>177</sup> No one claims that disputes, conflicts and disagreements will go away if only we begin to think in terms of preventative law. On the other hand, the optimal condition for obtaining civil justice in Ontario surely is not to load up the structural and financial incentives so that the aggressive articulation of disputes, conflicts and disagreements will be encouraged.

To conclude, let me paraphrase Grant Gilmore who made the following observation after surveying 200 years of law in the United States.<sup>178</sup> The character of litigation reflects, but in no sense determines the moral worth of a society. The better the society, the less litigation there will be. In heaven the lion will lie down with the lamb—and there will be little law and fewer lawsuits; in hell there will be an abundance of conflict—there will be nothing but law and

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<sup>177</sup> For an alternative, but analogous, symbol for rethinking law, see P. Nonet and P. Selznick, *Law and Society in Transition: Toward Responsive Law* (New York: Harper, 1978). For another alternative perspective, see S. Silbey and A. Sarat, "Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject" (1989) 66 *Denver University Law Review* 437.

<sup>178</sup> See G. Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977) at 110-111.

litigation will be rampant. This colourful, if overdrawn, image captures what is really at stake in the Civil Justice Review. Determining the social space that optimally should be allocated to the complementary metaphors of preventative and remedial law is the fundamental challenge facing those who would find a better understanding of access to justice and civil dispute resolution in Ontario today.



## **APPENDIX I**

### **ONTARIO CIVIL JUSTICE REVIEW – TERMS OF REFERENCE**

#### **PREAMBLE**

Traditionally, in Ontario, members of the public have resolved their civil disputes through the court process. This process—based primarily upon the adversarial method of dispute resolution—has ultimately led to justice.

In recent time, however, because of the pressures of modern litigation, such justice has come at great expense to the litigants, and, too often, after numerous and lengthy delays.

The members of the public require a more efficient, less costly, speedier and more accessible civil justice system.

#### **A CIVIL JUSTICE REVIEW**

To achieve this objective, the Government of Ontario and the Ontario Court of Justice (General Division), in co-operation with the Bar, have agreed to undertake a broad review of the civil justice system in Ontario. This review is mandated to develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure which will maximize the utilisation of public resources allocated to civil justice. It will identify the various problems within the existing system and design specific and implementable solutions to these problems.

The review will be conducted by a small Task Force jointly chaired by the Hon. Robert Blair, a Justice of the Ontario Court of Justice (General Division), and Ms. Sandra Lang, the Assistant Deputy Attorney General – Courts Administration. There will be two other members of the Task Force: a senior representative of the Bar and a representative of the public.

The review will conduct its mandate through two separate groups: an Interim Task Group and a Fundamental Review Task Group. Each will be responsible directly to the Task Force itself. The Interim Task Group will be supervised by Justice Blair and Ms. Lang. The Fundamental Review Group will be supervised

by the Chair of the Ontario Law Reform Commission and the Director – Policy Development Division of the Attorney General.

### **A. Interim Task Group**

The Interim Task Group will be responsible for identifying immediate points of pressure on the system and for developing proposals, to be implemented in the short/intermediate term, dealing with such things as:

- (a) the backlog;
- (b) case flow management and alternative resolution techniques;
- (c) venue for civil cases;
- (d) management information systems, scheduling, tracking and statistics gathering;
- (e) the re-organization of administrative staff and courts administration;
- (f) judicial support work and auxiliary judicial officers;
- (g) temporary court rooms;
- (h) construction lien caseload;
- (i) issues respecting the jurisdiction and staffing of Small Claims courts;
- (j) the design of strategies to address other pressures and problems identified but not dealt with.

This will involve not only the creation and development of new solutions, but also the co-ordination and integration of the several initiatives already underway amongst the judiciary, the bar and courts administration. In this latter category are such things as

- (a) the current case management projects in Toronto, Windsor and Sault Ste Marie;
- (b) the pending ADR Centre in Toronto;
- (c) the recently launched Advocates' Society Civil Litigation Task Force;

- (d) the current “Simplified Rules” study, designed to develop a new set of more easily understood and applied rules for cases involving smaller amounts of money;
- (e) a review of the appropriate venue for civil cases;
- (f) the review of electronic data interchange and its application to the courts, already begun by the Ministry;
- (g) the Toronto court re-engineering project which is now underway.

## **B. Fundamental Review Group**

It will be the function of the Fundamental Review Group to deal with issues of longer range implications for the civil justice system. Although longer range in its focus than the Interim Task Group, the Fundamental Review Group will nonetheless concentrate on recommendations and proposals that are achievable rather than simply for purposes of discussions.

The review will draw upon the resources and skills of the Chair of the Ontario Law Reform Commission and the director of Policy Development Division in connection with this aspect of its work. It will ask the Attorney General to request the Commission to review and report on matters fundamental to the Civil Justice System and the Review will take such Reports as are forthcoming into consideration in arriving at its ultimate recommendations regarding its long range proposals.

Some areas to be considered in this aspect of the Review’s mandate are the following:

- (a) the role and function of civil justice;
- (b) the question of how the superior trial courts can most appropriately and effectively carry out their mandate in dealing with civil cases, in terms of the way in which various types of cases are processed within and/or outside of the courts;
- (c) the role of Small Claims courts in providing effective access to the system, and the jurisdiction and structure of such courts;
- (d) the role of private industry in providing alternative methods for parties to resolve issues without resorting to the judicial process. This would include mediation, arbitration and other alternative dispute resolution processes;



- (e) the role and obligation of litigants to avail themselves of the various resolution initiatives provided by the court prior to the entitlement to a trial.

April 5, 1994

## APPENDIX II

### ONTARIO CIVIL JUSTICE REVIEW – FUNDAMENTAL ISSUES GROUP

#### ISSUES TO BE CONSIDERED

The fundamental issues group will be considering broad questions about the resolution of civil disputes. However, it will do so within a framework which requires workable and implementable recommendations within approximately one year of its start.

To this end, the Group will have to take existing constitutional structures as given. While recommendations might be made about approaches which could be taken if constitutional amendments became possible, the report must propose approaches which will work within the existing constitutional framework.

Within that framework, the Group should consider, and make recommendations on the most appropriate mechanisms for the resolution of the various kinds of civil disputes. The key issues to be considered include:

- What classes of civil disputes should be resolved through publicly-funded mechanisms, and which through private dispute resolution mechanisms?
- Of the disputes which should be resolved through publicly-funded mechanisms, which should be resolved in courts, and which in alternatives to the courts, such as mediation or arbitration?
- For disputes resolved in private mechanisms, what rules and/or supervision are required?
- What measures exist to simplify, expedite, make more efficient, and promote access to publicly-funded, decision-making mechanisms?
- What approaches are available to reduce the number of matters giving rise to disputes through such things as greater clarity and certainty in the law, anticipatory law reform, and support for dispute avoidance techniques.

The Group should approach these issues primarily from a functional point of view. The Group should identify, and articulate, the key attributes of courts in the adjudication of civil disputes, including such matters as constitutionally-protected independence, established procedures, a wide array of expertise, openness, binding jurisprudence, and accountability. The same approach should be taken to alternatives to the courts which may offer attributes such as specialized expertise, informality, and privacy.

With the key functional attributes identified and in light of key issues such as access, the Group should consider the various classes of civil disputes with a view to assessing on a functional basis, which classes of disputes belong in one or other of the two publicly-funded streams, and which should be left to private mechanisms. Consideration should also be given to ways to facilitate movement among the streams and to provide one-stop initial access to them.

In addition, the Group may want to establish a number of advisory bodies. One, for example, might deal with commercial and business interests. Another might reflect the interests of users of the Small Claims Court. Another might be drawn from groups which now rely heavily upon alternatives to the court process. Another might represent target group interests. In this way, the Group could have access to a network of expertise in specialized areas without having itself to be composed of a large number of specialist representatives.

## FUNCTIONING

All members of the Group would be encouraged to be open about the process, and to share the workings and deliberations of the Group widely. This would help ensure that the Group was kept informed of a variety of perspectives throughout its deliberations, and that the government could have some confidence that the recommendations were likely to be broadly acceptable.

The Group would meet approximately one day per month to develop issues for consideration, and undertake analysis of them. As research and other work began to come in, the Group would debate and evaluate those reports and then make its own recommendations to government.



## COMMENCEMENT AND TIME FRAMES

The process of selecting Group members will take a few weeks. Nonetheless, the objective would be to have the first meeting in very early June, with possibly a second meeting at the end of June or in the first week of July.

In the meantime, the chairs of the Group would commission, or undertake to produce, a short paper indicating the core issues for decision and providing some background on the issues, and on the review and its processes. The purpose of the document would be to focus the consultations which the Group would be undertaking. The paper would be presented to the Group at its first meeting and, if approved, could then be circulated to interest groups, in order to assist them to prepare their presentations.

At its second meeting, the Group could establish the advisory committees it feels necessary, and begin the process of assigning specific work tasks to staff made available to the review. The fall would be spent meeting with key-interest groups, receiving and reviewing reports, and beginning to receive the staff work. The major analytical work and the process of getting to recommendations would take place in the late winter and early spring of 1995, with a view to recommendations by June of that year.

## NOTE RE THE ROLE OF THE ONTARIO LAW REFORM COMMISSION

Because of its independence from government, it is important that work carried out by the staff of the Ontario Law Reform Commission for the review remain subject to publication and comment by the Commission itself. Once the Review Group has made its recommendations to government, the Commission should be free to accept or reject those recommendations and to make its own separate reports to the government, if it wishes. The Commission should also be free to publish independently, with or without recommendations, any research carried out by its staff.

April 19, 1994



## APPENDIX III

### CONSOLIDATED LIST OF PROPOSALS FOR CIVIL JUSTICE REVIEW RESEARCH PROJECTS

#### INTRODUCTORY NOTE

The proposals that follow are intended to summarize the basic themes of the Study and to suggest the kinds of research initiatives that the Ministry of the Attorney General, the Ontario Law Reform Commission, or the Fundamental Issues Group itself might undertake or sponsor so as to assist the Civil Justice Review either in generating background information or in implementing Pilot Projects. These proposals do not speak to the entire panoply of issues delegated to the Civil Justice Review, but only those touching the specific question addressed by this Study: is it possible to achieve a more economical, expeditious and accessible civil justice system through a re-allocation of civil disputes among different judicial and non-judicial, and public and private, conflict resolution institutions?

The following recommendations are of three broad types: (i) empirical studies of the actual terrain of civil disputing; (ii) documentary studies of the current configuration of civil disputing institutions in Ontario; and (iii) analytical studies to map current practices onto different theoretical models suggested in the scholarly literature. Some of these have a relatively short-term horizon while others involve multi-year investigations. All seek to generate insight into the patterns of civil disputing of the type that can lead to specific reforms in particular areas, rather than a “global reform” of the Ontario Civil Justice System.

1. A system to generate data about current patterns of civil disputing in Ontario should be established. Initially, this system would track all cases filed in the Ontario Court (General Division), but should ultimately be expanded to cover administrative tribunals and other dispute settlement mechanisms, including private mechanisms that have been legislatively mandated. (paras 3, 4)



A Research Project, perhaps based on the model now in place in France, or that of the Cook County Jury Verdict Reporter should be launched in order to develop a methodology for generating data about civil disputing, and for determining what kind of information should be sought.

2. A system of executive *ex ante* audits in the same nature as the Treasury Board review of departmental spending should be established so that the civil disputing consequences and the relative cost/benefit of any new civil law legislative initiatives can be determined. **(paras 10-14)**

A Research Project to examine the possible structure and functioning of an internal, Cabinet control procedure over legislation, and to develop a list of factors that might be evaluated in deciding how new legislation should be drafted, and where newly created dispute should be allocated.

3. A system of five and ten year *ex post* audits of legislation patterned on regulatory audits of administrative programmes should be established so as to review the civil disputing consequences of legislative reform or consolidation of the civil law. **(para 14)**

A Research Project to examine how to undertake post-enactment legislative audits, and to develop an evaluative framework by which the consequences of different legislative initiatives may be modelled should be undertaken.

4. A review of the number and character of civil disputes currently assigned to the Ontario Court (General Division) or its judges that do not fit the strict logic of adjudication should be established so as to get a read on the actual legislative uses of the judicial process. **(paras 15-18)**

This requires a Research Project to audit the Ontario statute book with a view to determining how many statutes authorize, or require, judges to exercise non-adjudicative powers.

5. A review of the number and character of strictly adjudicative functions currently assigned to statutory decisionmakers other than courts should be undertaken so as to get a read on what kinds of adjudication the legislature currently thinks appropriate for non-judicial processing. **(paras 19-20)**

Again, this demands a Research Project to audit the Ontario statute book with a view to developing an inventory of non-judicial bodies exercising statutory powers of decision, and to characterizing the nature and volume of decisions so taken.

6. A review of the number and character of strictly adjudicative or mediational functions imposed by statute upon private decisionmakers, either on an obligatory basis, or on a consensual basis, should be undertaken so as to provide a read on current policies about private decisionmaking. **(paras 21-22)**

This implies a Research Project to audit the Ontario statute book with a view to developing an inventory of private decisionmakers who have been vested with adjudicative or mediational powers, whether by consent or by law.

7. A review of the capacity of the legal profession and of the law faculties to prepare lawyers to manage dispute resolution processes other than civil adjudication should be undertaken with a view to examining both the monopoly features of legal practice and the curriculum of legal education. **(para 23)**

A Research Project to examine whether current programmes of legal education adequately prepare members of the Bar to exploit alternative dispute resolution mechanisms should be launched.

8. A survey of the central characteristics of interpersonal disputes and the various ways by which civil disputes have been, and might be classified, should be undertaken so that the legislature has an inventory of axes for sorting them into different categories. **(paras 29-33)**

A Research Project is required to develop a comprehensive inventory of axes of classification of civil disputes and to conduct a survey of which axes of classification are currently deployed, and have been deployed in common law jurisdictions in the past, for allocating civil disputes to different decisionmaking bodies.

9. A survey of the judiciary, the legal profession, interest groups and the general public needs to be undertaken in order to get a fix on the kinds of disputes that different constituencies feel should be allocated to the Ontario Court (General Division). **(paras 34-35)**

A Research Project to design and administer a questionnaire to various constituencies as to their perceptions of the optimal allocation of civil disputes should be undertaken.

10. A general literature review of the various typologies of dispute resolution mechanisms, including but not limited to those typologies proposed in the United States and an audit of the statute book to determine which types are now in use should be undertaken in order to provide an inventory of civil disputing mechanisms. **(paras 36-38)**

This implies a Research Project to develop an inventory of civil disputing mechanisms now in use, and potentially available for use in Ontario.

11. A survey should be made of the different ways in which private civil dispute resolution (*ex ante* and *ex post* contractual arbitration, court-managed arbitration, compulsory arbitration) is now being undertaken with a view to determining the kinds of situations in which one or the other might be proposed. **(para 39)**

A Research Project should be sponsored to examine the procedural and jurisdictional elements of diverse forms of private third-party dispute settlement.

12. A survey of the kinds of situations where private third-party decisionmaking should be subject to judicial supervision needs to be undertaken, and a model for exercising that supervision should be proposed. **(para 40)**

A Research Project is required to develop a list of criteria for determining when a private dispute settlement procedure should be subject to public supervision, and propose a model like the existing *Judicial Review Procedure Act* to supervise private decision making which is responsive to the entire range of decisionmaking procedures potentially chosen by parties to a civil dispute.

13. A survey of the kinds of situations where private third-party decisionmakers should be subject to certification procedures, and where minimum procedural standards should be imposed on decisionmakers should be developed in order to ensure the integrity of non-judicial dispute settlement. **(para 41)**

This demands a study of what kinds of due process constraints flow from what kinds of processes, and what kinds of training should be incorporated into single-member and three-member tribunals and into mediation, and should examine how a model like the existing *Statutory Powers Procedure Act* might be developed for the entire range of private decisionmaking processes.

14. A survey of the mechanisms by which a central computerized registry of civil disputing in Ontario might be established, and of the kinds of disputes that should be made subject to filing should be undertaken so as to permit the auditing of non-judicial decisionmaking. **(paras 42-44)**

A Research Project should be launched to examine the design of a central computerized registry of civil disputing in Ontario, including all non-judicial and private dispute settlement mechanisms which generate executory orders enforceable by civil process.



## APPENDIX IV

### A BRIEF SUMMARY OF METHODOLOGICAL PROBLEMS IN EVALUATING DIFFERENT SCHEMES FOR ALLOCATING CIVIL DISPUTES

The narrative parts of this Study suggest that there is almost no intelligible way to allocate disputes among different types of institutions according to their nature, characteristics, or outcomes. Nevertheless, to demonstrate this impossibility is no small task. In this Appendix I do no more than suggest what it would be necessary to know in order to undertake a “scientific” allocation of civil disputes. The discussion that follows draws on the article published by John Esser in the *Denver University Law Review* Symposium entitled “Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know”, and the study by Andrew Pirie, *Dispute Resolution in Canada: Present State, Future Direction* (Victoria: Law Reform Commission of Canada, 1987).

As noted earlier, the exercise of dispute allocation presupposes both data and a purpose. Data is of four basic types: first, data about different typologies of dispute resolution processes (P); second, data of different types of disputes (D); third, data about measures which are comparable (M); finally data about outcomes, real or assumed (O). Purposes are as infinitely variable as political programmes and theories of justice (J).

#### 1. Types of Dispute Settlement Mechanism

The text notes a wide range of potential dispute settlement mechanisms, be they developed on formal or informal grounds, be they developed by reference to institutions or to process. One of the most commonly used is that proposed by Goldberg, Green and Sander. They locate four types of mechanism: adjudication, arbitration, mediation, negotiation. They also postulated five mixed mechanisms: private adjudication, neutral expert fact-finding, mini-trials, ombudsman services, and summary jury trials.

These forms and mechanisms are distinguished on the basis of seven criteria: degree of voluntariness, binding nature of the agreement, presence and responsibilities of third parties, degree of formality of the process, nature of the proceeding, openness or *in camera* nature of the proceeding.

Many studies in the United States implicitly adopt the above taxonomy, although, as the text argues, there can be other ways for characterising dispute settlement processes.

## 2. Types of Civil Disputes

Even more than in respect of types of dispute settlement mechanism, there is significant divergence of opinion about how to characterize dispute types. In the body of this study, an attempt was made to suggest a number of factors that in the past have been used to differentiate types of dispute: issue in dispute, parties, remedy sought, object of the dispute, legal category (*i.e.* civil, criminal, etc.), whether or not the dispute involves deciding a policy question, whether or not the dispute is likely to generate a decision having significant precedential value, and so on. While each of these factors offers an interesting window on civil disputing, none of course, has a deep theoretical justification.

In *Dispute Resolution*, Goldberg, Green and Sander propose a taxonomy which highlights six salient features of disputes: (i) is the relationship between the parties ongoing or not? (ii) what is the nature of the dispute? (iii) what is the amount at stake? (iv) what is the speed at which the dispute is processed? (v) what is the cost of processing the dispute? (vi) what is the power relationship between the disputants?

This typology seeks to identify key sociological factors of any dispute. It does not, however, highlight what appear to be the salient case characteristics affecting outcomes identified by D. Black, *Sociological Justice*. The typology also seeks to identify key legal characteristics of any dispute. Of course, this typology does not account for other characteristics I have signalled such as legal category: civil, criminal; or consumer-non-consumer; employment; malpractice; neighbourhood disputes; landlord-tenant; succession; family relationships; and so on. The range of potential alternatives is also canvassed in the text.

## 3. Measures of Comparison

This of course, is the most difficult assessment to make. What exactly are the relative variables to measure, and upon what baselines should they be measured. Extrapolating from studies already conducted, one sees a number of suggestions for such variables: (i) cost; (ii) delay; (iii) party satisfaction; (iv) equity; (v) fairness; (vi) ease of execution; (vii) avoidance of future conflict; (viii) cost to society.

In an important study Robert Baruch Bush identifies fifty (50 !) statements about quality, which he then organizes into six categories: (i) individual satisfaction; (ii) individual autonomy; (iii) social control; (iv) social justice; (v) social solidarity; (vi) personal transformation.

Even were it possible to agree that these fifty items constituted the true measures for assessing the quality of different types of dispute settlement mechanism, there remains the problem of weighting these so as to make them capable of comparison.

#### **4. Data About Outcomes (Real or Assumed)**

Here one can only draw on existing empirical studies, or, one can adopt a predictive model from one of the social sciences: for example, an economic analysis of disputing strategies; or a social power analysis of disputing strategies. What one finds is that there is no agreement on how the three sets of variables just identified should be correlated. There are almost no studies that explicitly attempt to correlate T and D against various M so as to produce a hypothetical O.

In other words, the only conclusion to be drawn from the rich literature in the United States, is that there are simply too many incommensurable features to predict anything. We don't know our categories; we don't know our data; and we don't know our values.

#### **5. Legislative Purposes**

The final methodological problem relates to our relative uncertainty of purpose. Unless the legislature is prepared to lexically rank the various possible purposes to be pursued in civil justice reform—reduction of cost, reduction of delays, more efficient use of court rooms and judicial time, rates of voluntary compliance with judgments rendered, and so on—there is no way of even deducing a possible reordering of the civil justice system.





## APPENDIX V

### SOME PROPOSALS FOR ALLOCATING CIVIL DISPUTES

#### INTRODUCTORY NOTE

After the discussion of the previous Appendix and indeed, the argument of this entire Study, it would take a great deal of temerity to propose any criteria for allocating civil disputes. Nevertheless, as a means of generating discussion as to concrete outcomes, the following are listed as possible means of approaching the exercise. I am grateful to the commentators on this Study who presented written critiques of this Appendix, and especially to George Priest, who demonstrated in exquisite detail why any project like that suggested here is bound to fail. They each revealed, much more cogently than the Appendix itself, the perils of the exercise.

As noted, this Appendix was initially drafted for heuristic purposes. The proposals set out have not been modified to take account of the critiques advanced by the various commentators. It bears notice, however, that I am in broad agreement with the overall tenor of these criticisms.

The underlying concern giving rise to a consideration of reallocating civil disputes was a perception that civil justice was slow, costly and inaccessible—especially, although not exclusively because of an unmanageable workload visited upon the Ontario Court (General Division). For this reason, the allocative principles set out below are directed to tracing a new jurisdiction for the Ontario Court (General Division). Yet a similar exercise would have to be undertaken for all other decisionmaking bodies. Unfortunately, however, it is hard to imagine how the allocation could take place on any *ex ante* basis since the number and nature of alternatives is infinite. What is more, there is no evidence that a re-allocation of civil disputes would have anything more than a marginal impact on the costs and delay of civil adjudication in the Ontario Court (General Division). Even were, say, 10,000 landlord-tenant or labour standards cases to be allocated to other bodies, it does not follow that none of the approximately 90% of the cases that now settle would be brought to trial.

Finally, whatever the allocative principles suggested, they are likely to come into conflict when they are applied to individual cases. At this point a second-order rule will have to be adopted. No second-order rule is without its problems. Nevertheless, on the assumption that a Civil Justice System is intended in the final analysis to serve people—that is, even if corporations are vested with legal

personality this occurs not because agglomerations of capital are worthy of moral regard in themselves, but only as instruments for procuring a better life for human beings—an argument can be made for a second-order rule that gives priority on the basis of the parties to a dispute, rather than on the basis of the source of the dispute, its nature, its object or the remedy sought. Unless otherwise noted, when the expression Ontario Court (General Division) is used, this means that current rules about the cost of litigation should be maintained.

The implications of excluding certain disputes from the Ontario Court (General Division) are two-fold. First, they must be placed elsewhere. Of course, among the possibilities for placement is non-placement: that is, the legislature may simply decide that certain types of disputes should not give rise to a cause of action that can be brought before a body with coercive jurisdiction, be this body public or private, consensually chosen or legislatively mandated. Second, a decision must be taken as to the role of the government in financing the dispute settlement process. Implicit in the following principles is that whenever the cost of litigation can be written off as a cost of doing business, any dispute resolution institutions provided by or authorized by the State should be entitled to recover the full cost of the litigation from the disputants, or a proportionate share from that litigant who is able to pay for the process with before-tax dollars.

A number of other values are implicit in the list of allocative principles that follows. At least one should be made explicit. Whenever the balance of social power lies heavily against a physical person, the mechanism adopted should be designed, at least in part, to rebalance that disparity of social power. In other words, the principles that follow respond to the same logic that sustains recourse to administrative decisionmaking procedures whenever concerns about the ability of individuals to successfully prosecute claims against larger entities are in issue.

It bears reiteration, however, that this list of general allocative principles is intended to stimulate discussion about values implicit in debates about alternative dispute resolution. In itself, this list itself has no intrinsic value.

## **I. PARTIES TO A DISPUTE**

1. As a general principle, the Ontario Court (General Division) should have jurisdiction in all cases in which the parties to a dispute are two physical persons.
2. As a general principle, the Ontario Court (General Division) should have jurisdiction in all cases involving actions between physical persons and the Crown in Right of Ontario and governmental agencies.



3. As a general principle, the Ontario Court (General Division) should have jurisdiction in all cases where a physical person is seeking relief from a corporation.
4. As a general principle, the Ontario Court (General Division) should have jurisdiction in all cases where a non-profit organization or a charity is a party to a dispute.
5. As a general principle, the Ontario Court (General Division) should not have jurisdiction in all cases whether the parties to a dispute are two corporations or partnerships.
6. As a general principle, the Ontario Court (General Division) should not have jurisdiction in any matter relating to corporate governance.

## **II. KINDS OF DISPUTE**

1. As a general principle, the Ontario Court (General Division) should have jurisdiction in any matter relating to the ownership or use of land, but not the adjudication of construction liens.
2. As a general principle, the Ontario Court (General Division) should have jurisdiction where the relief claimed is in the nature of an injunction, or an order of specific performance, or an order requiring ongoing judicial supervision.
3. As a general principle, the Ontario Court (General Division) should have jurisdiction in any matter related to the interpretation of a will or the distribution of a succession.
4. As a general principle, the Ontario Court (General Division) should have jurisdiction where the amount in dispute is more than \$25,000.
5. As a general principle, the Ontario Court (General Division) should not have jurisdiction to decide commercial disputes.
6. As a general principle, the Ontario Court (General Division) should not have jurisdiction to decide tort cases not involving personal injury or the infringement of a civil rights guarantee.
7. As a general principle, the Ontario Court (General Division) should not have jurisdiction to decide any collections case that relates to a consumer purchase, or unpaid rent.

### III. STRUCTURE OF THE DISPUTE

1. As a general principle, the Ontario Court (General Division) should not have jurisdiction to decide any matter where more than 50,000 causes of action are filed per year.
2. As a general principle, the Ontario Court (General Division) should not have jurisdiction to decide any matter where expert witnesses are required to prove either causation or economic damages.
3. As a general principle, the Ontario Court (General Division) should not have jurisdiction to decide any matter where the only matter in dispute is the amount of damages owing.

## APPENDIX VI

### SELECT BIBLIOGRAPHY

#### INTRODUCTORY NOTE

As noted in the Preface, the literature on the topics assigned to the Civil Justice Review is simply enormous. For this bibliography to be useful, therefore, it has been arranged in part according to the type of material, and in part according to the topic addressed. Two main topics have been selected: I. Access to Justice; and II. Alternative Dispute Resolution, Litigation and The Judicial Process. Within each topic an attempt has been made to note sources which themselves contain further bibliographies.

In general I have not cited here any of specific articles contained in Symposia, nor have I given references to major works cited in the sources listed here. I have, moreover, not listed those major law review articles that have already been mentioned in the footnotes. Legal literature in the United States tends to be self-referential so that once one has “entered the loop” it is not difficult to find endless citations for any point. For this reason I have given greater emphasis to both Canadian and French-language materials. Finally, no serious research in the area can be undertaken without a comprehensive examination of a number of legal periodicals. Among those of particular interest are:

1. Canadian Journal of Law and Society (Canada)
2. Civil Justice Quarterly (U.S.)
3. Droit et société (France)
4. Journal of Law and Society (U.K.)
5. Judicature (U.S.)
6. Law and Social Inquiry (U.S.)
7. Law and Society Review (U.S.)
8. Mediation Quarterly (U.S.)



9. Negotiation Journal (U.S.)
10. Windsor Yearbook of Access to Justice (Canada)

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COMMENT ON “PROSPECTS FOR CIVIL JUSTICE”

by

Harry W. Arthurs\*

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INTRODUCTION

Professor Macdonald’s paper begins as all such papers should: with unnecessary *caveats*, inappropriate modesty and unanswerable questions (which are however answered). My comments will similarly begin as all such comments should: with admiration for the formidable intellectual achievement of the paper, with a large measure of concurrence with its underlying reasoning and practical

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recommendations, and with just three little quibbles (we are, after all, academics).

### THREE LITTLE QUIBBLES

My first quibble is with the literary “voice” of the paper, a voice which might be described as “first person collective (impersonal)”. The paper speaks from “us” and to “us”, us being the prime readers, the members of the Civil Justice Review, an agency of the Ontario government, and some invited critics. We, in turn, are all members of a community of relatively progressive, instinctively activist, mildly agnostic and (an irrebuttable presumption!) intellectually rigorous lawyers, social scientists and public servants who genuinely want to make the world a better place. Some of us put our trust in the inevitability of historical processes and some in the transformative power of ideas, some in the state and some in the market, some in the legal system and some in social mobilization. But within the Civil Justice Review, and between it and its contributing authors and responding critics, there is assumed to be a common perspective about the ends, if not the means, of reforming civil justice. This assumption is likely more nearly right than wrong, but it does make a complex problem seem simpler than it is.

Specifically, we are all assumed to begin from the proposition that making the civil justice system more “economical”—or “expeditious” or “accessible”—is a good thing, and making it all of the above is even better. Fair enough: few of us would wish to be heard arguing the contrary—though the paper does come perilously close to doing so at several points. But in our heart of hearts, we know that this proposition just does not compute. We live in a world in which the boundaries between “civil” society and “civil” justice, on the one hand, and state policies and public interests, on the other, are shifting and permeable, in which “justice” in all its forms is differentially experienced by people and groups according to their socio-economic status, in which “systems” are often incivil and unjust, in which making things more “economical” seldom results in qualitative improvements, and making them more “accessible” almost always makes them less “economical” and less “expeditious”.

In short, as Macdonald would doubtless acknowledge, his paper’s title\*\* expresses the mother of all oxymorons. However, he is too polite—too first person impersonal (collective)—to say so; and I am too.

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\*\* (ed. note). The draft title of Professor Macdonald’s paper at the time of preparing this comment was “Economical, Expeditious and Accessible Civil Justice Through A Better Allocation of Civil Disputes: A Framework For Inquiry”.

Why? Because we—all of us—are engaged in two quite different processes. We wish both to speak truth to conventional wisdom, and to speak conventional wisdom to power. What we want to do, and what this two-step strategy allows us to do, is to retain our integrity as intellectuals while getting on with the short-term analytical and advisory tasks in which we are engaged as practising professionals. But it is a two-step strategy; it cannot be elided; we are not in fact here to tell truth to power. If we were, we would urge the Fundamental Issues Group to tell the Civil Justice Review to tell the government that its project cannot be realized.

That is my first quibble about the paper's "voice": it is too collective, too impersonal, too polite. I have a second quibble, also about the paper's voice: it is too "legal". This may seem surprising, given that it calls into question many of the assumptions, institutions, processes, practises and consequences of law. But it is, nonetheless, a paper which has everything to say about law, and nothing (or nothing much) to say about life.

Life is going through a rough patch just now: the economy is recovering without most of us having much to show for it; the social fabric is fraying with little prospect that civility will soon return; and the democratic political process itself is disparaged and delegitimated by paparazzi and populists, by right and left, and by solipsistic interest groups. All of this directly and profoundly affects the quality of civil justice—of all justice—but the paper does not and cannot say so. Instead it talks about the civil justice system as if it existed in a world apart, or more accurately, as if it might be improved without profound changes in the larger socio-economic system in which it is embedded.

No doubt, all of "us"—including the government—genuinely want to improve the civil justice system, to address deficiencies in its design and execution, if not in its organizing concepts and deep structures. But it is odd that reform of civil justice should come onto the public agenda just at this moment. Given the many other urgent problems, surely legislative time and public funds could be better spent. For example, more civil justice might be achieved for a broader spectrum of citizens, per dollar spent, by increasing adult literacy and public information about law and justice, rather than by appointing more judges or funding more Charter challenges. Indeed, as Prof. Macdonald demonstrates, if we really wished to enhance civil justice, we would concentrate on changing the substantive rules of law so as to shift the balance of power from favoured to disfavoured groups, from sellers to buyers, from employers to workers, from creditors to debtors.

No doubt there would still be waste and congestion in the system. How should we organize its scarce resources and improve its methods of doing business? Perhaps, in the spirit of the paper, we might make civil justice more efficient, expeditious and accessible for ordinary citizens by telling certain



categories of wealthy disputants that they should take their problems elsewhere, that they are subject to a user-pay policy, or that they have last—not first—call on the scarce resources of the court system. Translation: put poor people's lawsuits on a fast track, and business litigation on a slow track; shunt rich people's disputes into private dispute resolution systems; or offer as, an alternative to privatization, the equivalent of the TGV, a high-speed public adjudication available at premium prices—court fees which approximate the true cost of providing court facilities, staff and judges.

These, alas, are measures the Civil Justice Review is unlikely to recommend. In our present historical circumstances, improving civil justice seems to mean something else—something distinctly “legal”, as Macdonald implicitly acknowledges. After two centuries of sporadically intervening to try to make things better for people, and sometimes even succeeding, governments are winded, out of ideas, out of credibility, out of resources. But they persist with “improving civil justice”. Indeed, at a moment when so many countries and political parties and interest groups and academics are preoccupied with empowering individual citizens, energizing markets, and reducing the cost and size of government, the reform of civil justice may well be the *only* viable project within the liberal repertoire of reforms.

Consider how compatible the project is with today's preoccupations, empowerment of the individual, promoting free markets, and “reinventing” government.

Access to justice is just what rights-bearing citizens want (or imagine they want) and what marginalized groups need (or imagine they need) to assert themselves effectively against an unsympathetic society and an unresponsive polity.

Properly functioning markets, of course, neither need nor want more civil justice. *Au contraire*: civil justice is one of the most innocuous possible responses to market failure; that is the reason the interventionist, administrative state was developed in the first place. The market can cope with civil justice: invisible hands signal and steer, businesses somehow navigate around legal obstructions, and markets do their work regardless of what happens, or does not happen, in the courts.

Nor is the reform of civil justice incompatible with the challenge of “spending less and spending smarter”—the obsession, these days, of all ministries of all governments. Spending less is certainly an achievable goal for the reform of civil justice. The civil justice system already operates largely on the user-pay principle when legal costs are taken into account—which is why access is always a problem. It generates no intelligible statistics and has no reliable productivity

benchmarks—so that virtually any change can promise productivity improvements (and some can even deliver). And civil justice remains only a small, visible outcropping of a much larger and invisible bedrock of dispute resolving institutions and processes. Push more disputes down to bedrock, allow the number of judges to attrit, close down some courtrooms, reduce the legal aid budget: “spending less” on civil justice is well within our grasp.

So is “spending smarter”. “Spending smarter” sounds as modern as e-mail and as imminent as the information highway. Indeed, who could fail to spend smarter, to achieve greater efficiency, in a system some of whose defining characteristics antedate the invention of the printing press? We know what business consultants might prescribe: eliminate redundant personnel and inefficient practises; reduce paper flow and rely more on electronic communication; de-layer the bureaucracy; increase production quotas and use sanctions and rewards to ensure they are achieved; and if all else fails, close down the operation or move it elsewhere. I leave to your imagination the translation of these well-proven techniques into the context of the civil justice system, but the potential for increased efficiency must be very great indeed.

The reform of civil justice, then, is a project for our time. But it is not a project whose *fundamental* issues any government just now can afford to explore. To truly explore fundamental issues would require us to pass beyond a concern with improving the institutions of law; it would require us to acknowledge that civil justice cannot be much improved so long as we—willingly or under duress—tolerate injustice in our social and economic institutions. But improving society (for most of us) implies more of all the things which we are told to want less of: government, social engineering, public expenditure.

This is a discouraging observation, I concede, but at least it propels me forward to my third quibble. By speaking in an impersonal voice, as “us”, the paper steps gingerly across the fault lines which divide the optimists amongst us from the pessimists, the pragmatists from the perfectionists, the doers from the critics. True: the paper does incline in each case to the second, not the first, of these sets of antonyms. It is pessimistic, perfectionist and critical: that is why I admire it so much. The Civil Justice Review, on the other hand, has to be optimistic, pragmatic and activist: that is what the government has mandated it to be. But this confronts “us”—the author, me, and many other participants—with a dilemma. Those of us of the pessimistic/perfectionist/critical persuasion have nonetheless to contribute something optimistic/pragmatic/activist to the discussion. Although we have taken the Attorney General’s salt, this is not simply a professional imperative for most of us; it is an existential imperative: if we cannot make things better, what is the meaning of our lives and work?

Macdonald manages somehow to cope with these dilemmas, to brush aside this third quibble as easily as he brushed aside the others. He sees the problems clearly enough but somehow, despite his own predilections, he manages to suspend disbelief, to pass beyond the inescapable contradiction of proposing civil justice in an unjust world, and to offer wise advice and propose practical steps towards the improvement of the civil justice system. What does he propose?

## GETTING THE FACTS [Recommendations 1, 9, 14]

The paper proposes a number of data gathering and research initiatives. Given the cost and difficulty of reconstructing the past experience of the civil justice system, he proposes the easier and cheaper option of capturing and analysing data which the system will generate in the future. Why is this so important?

One of the most significant lessons of socio-legal research is that we know very little about how (or even whether) law works. Further, what we “know” we do not really know. The civil justice system generally runs on anecdotal and sacerdotal knowledge rather than knowledge generated by a social “scientific” model. Finally, the civil justice system is pretty profoundly a—(or is it anti-?) theoretical. Thus, even when we have information, we are not quite sure what to do with it, how to interpret it, how to work with it.

The civil justice system is not unique. The health system has a lot more knowledge, but it is a mess. Universities are presumably well-supplied with theory but they are in perpetual crisis. Business invests heavily in information and advice, but still manages with great regularity to snatch bankruptcy from the jaws of market opportunity. Nonetheless, all of these other systems are now taking seriously the task of diagnosing and prescribing for their own ills. Civil justice is not, nor will it be, nor can it be, until it begins to collect accurate information and to think systematically and scientifically about its problems.

However, the proposal that there should be more research is important for another reason. As noted, the civil justice system is essentially an institution designed, run and regulated by its inmates, the judges and lawyers. Macdonald proposes that the views of judges and lawyers on systemic reform of civil justice should be sought more regularly and, presumably, heeded more carefully, than at present. This proposal is in line with the current tendency to reinforce, not reduce, the autonomy of the system, on the premise that judges—and, by extension, lawyers—are the ultimate guarantors of constitutional government. (Professional-judicial autonomy may have produced its own *reductio ad absurdum*: several lower courts have ruled recently that judges are



constitutionally guaranteed that governments will raise their salaries and not to lower them.)

Good or bad, true or false, the necessary implication of an increasing tendency toward professional-judicial autonomy is that there will need to be more and more dialogue between government on the one side and judges and lawyers on the other. In such a context, the recommendation for more information and better analysis takes on special importance. Without information we would have a dialogue of the wilfully deaf. With it, there is at least a chance that a serious encounter might be organized between internal and external perspectives on civil justice, an encounter which might bring into better focus multiple dimensions of public interest, multiple logics of power, multiple visions of a democratic society—and, most importantly, multiple forms of knowledge needed to design an improved civil justice system.

## **PRE- AND POST-ENACTMENT AUDIT OF LEGISLATION** [Recommendations 2-3]

My strong support for more research might seem logically to require that I support the proposal to use the product of research for the purpose of *ex ante* legislative audits. I can see that logic, but then (am I actually stooping to this?) “...the life of the law is not logic but experience...”.

Obviously, learning from experience permits us to support the civil justice reform process with the most and best information we can muster. With that information, we can ask some very pertinent questions: what benefits can we expect from new legislation or new institutional arrangements? at what cost? for whom and to whom? when and for how long? and in the current context: with what ultimate consequences for justice and the public fisc? These are hard questions to answer in any given case—what to do about construction liens, say—for three related reasons. First, as I have already suggested, we presently lack the analytical frameworks, the empirical methodology and the baseline data with which to produce reliable “scientific” predictions about costs and benefits. Second, legislative conceptualization, enactment and implementation of public policy are not exclusively or primarily technocratic processes of juridical production in need of better quality controls; they are to a very large extent political processes which are audit-proof. And third, these two factors make legislative audits intrinsically problematic and vulnerable to political manipulation.

As the paper acknowledges, this risk of manipulation enhances the already formidable difficulty of enacting legislation. Opponents will always be able to say, plausibly, that more or better research is needed, that proposed legislation

will cost too much or achieve too little, that a new statute will affect interests which have not been consulted or accommodated, that there is another, fairer, cheaper, better way to accomplish public policy goals whose relative attractions ought to be investigated, and so on. These things are said now, of course, but largely in the context of political debate rather than of “scientific” analysis. Until we actually are ready to be scientific—with better facts, better analysis—should not these objections be left in the realm of politics?

Much the same argument can be made in connection with *ex post* audits. Opposition parties and interest groups seeking to discredit the government will have no difficulty in turning the results of any audit to their own partisan ends, while supporting or impugning the audit process (as the situation requires) on the grounds of its “objective” scientific character. However, as proposed, *ex post* audits will at least be informed by the lessons of five or ten years of actual experience, which may both improve the quality of the audit and reduce the risks of politicization.

## JURIDICAL TAXONOMY AND GENETIC ENGINEERING [Recommendations 4-8, 10-11]

The paper proposes a number of taxonomic projects: of adjudicative functions, of statutory powers, of courts and tribunals, of private decision-makers etc. These projects will yield information which in turn will facilitate genetic engineering, the redesign of existing—and especially embryonic—institutions in the civil justice system, in order to achieve a better match between ends and means, between tasks and abilities, between resources and needs, etc.

These are sound technocratic proposals, and indeed, their implementation might assist in avoiding some egregious legislative errors which produce mismatches between the institutional design of the system of civil justice, and the social ends it is intended to achieve.

However, egregious legislative errors are not always the result of insufficient information or understanding. Sometimes they result from having to make what seems like the “least worse” choice from an imperfect menu of options. Sometimes they result from win-some, lose-some trade-offs between proponents of competing public policies or interests. Sometimes they result from the blinkering effects of a particular government’s ideology or world-view. Sometimes they result from underestimating the perversity and obstructive capacity of those whose interests are adversely affected, or overestimating the determination and competence of human agents upon whom we must depend to execute new legislative schemes. Sometimes they result from nothing worse than

an inability to foresee the unforeseeable—a radical change in public mood, government finance or key personnel.

Technocratic solutions, therefore, do not cure non-technocratic problems. But they do help to avoid technocratic blunders, and if we can do that, we will be somewhat farther ahead.

## **PUBLIC, PRIVATE AND PLURALISTIC JUSTICE**

### **[Recommendations 12-13]**

The paper recommends reconsideration of the extent to which, and the modalities by which, the public civil justice system should attempt to regulate private “alternative” systems. This is a positive recommendation, in so far as it seeks to provide room for a more pluralistic approach to civil justice. But I fear that this is pluralism on too short a leash.

The recommendations proceed from the conventional assumption that it is within the capacity and mandate of the state’s legal order and institutions to oversee the vast array of high—and low-visibility processes by which most civil disputes are processed.

However, these recommendations (and, to a lesser extent, the text of the paper) fail to address the real challenges of “alternative” systems of dispute resolution. First, they are “alternative” or abnormal only to outside observers, especially those habituated to the *modus operandi* of the formal legal system. To those who live within the communities served by these systems, it is the state’s civil courts which are “alternative”—and indeed, so alternative that to resort to them is to engage in pathological behaviour. Second, to use contemporary academic jargon, if we were indeed to “de-centre” the civil courts—to acknowledge them (in their present form) as anachronistic, culturally-determined and often ineffectual, to accept that they are simply one amongst an infinite array of institutions for dealing with social conflict—we would never dream of holding out the courts as a model to be emulated, or of assigning to them the task of policing “alternative” systems.

Recognition of something like this de-centred view of the civil courts recurs throughout the paper. It makes these particular recommendations—12 and 13—difficult to understand.



## CONCLUSIONS

Rather rudely—but (I hope) sympathetically—I have argued that the Fundamental Issues Group cannot seriously deal with fundamentals and that the Civil Justice Review cannot do much to improve the system, without in either case addressing problems well beyond the formal mandate of the Review, and the practical, political reach of any government today. What is to be done?

1. The Civil Justice Review can and should get on with the “interim”—but unending—task of fine-tuning the system. The Review is unlikely to harm the system very much: it has survived Roscoe Pound, Chief Justice McRuer, Lord Denning and worse. If the Interim Task Group is careful, and willing to be asked some hard questions, it might even manage to make marginal gains in terms of accessibility, expedition and efficiency.
2. The Fundamental Issues Group should abandon its attempt to articulate and pursue fundamental issues in the present context. Instead, it should frankly begin to function as the super-ego of the Civil Justice Review. (I accept that psychoanalysis seems to be going the way of the interventionist state, but the metaphor is still serviceable.) By this I mean that the Fundamental Issues Group should adopt Professor Macdonald’s perspective, and bring a different kind of intelligence, a different store of knowledge, and a different set of values to bear on the practical, professionally-oriented proposals which are likely to emerge from the Interim Task Group.
3. In the longer term, attention to fundamental issues is clearly required. In order to institutionalize government’s capacity to introduce this kind of perspective into the design and management of the civil justice system, the Law Reform Commission or some other agency in the Ministry should be charged with setting up a small research unit to improve our knowledge and understanding of all aspects of disputing and dispute resolution, including the civil justice system.

# COMMENT ON FUNDAMENTAL REVIEW OF THE ONTARIO CIVIL JUSTICE SYSTEM

William A. Bogart\*

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## I. INTRODUCTION

This comment<sup>1</sup> on the Ontario Civil Justice Review is divided into two parts. The first raises issues about the scope of the project and about questions of access. It will be evident that I am troubled by how these issues are addressed. The second part grapples with a number of recommendations contained in the study paper.

Yet I also recognize that those who are asked to comment have the comparatively simple task of focussing on individual points. The harder task is surveying the entire terrain of issues and the field of choice. The most difficult challenge is devising a process for grappling with the complex and fundamental questions in this review and then making the necessary and difficult decisions regarding those questions.

## II. GENERAL COMMENTS

### (a) ASSIGNING DISPUTES: THE IMPORTANCE OF THE ADMINISTRATIVE STATE

I am confused about the central goal of the project. Is it to canvass the entire range of options in dealing with dispute processing? Or is it only to focus on courts and ADR as alternatives to each other?

These questions are “fundamental” because if the goal is to answer the former question the exercise requires taking full account of the richness and opportunities—and, yes, the shortcomings—of the administrative state as *the* alternative to the courts in twentieth century Canada. If, on the other hand, the focus is on the latter, the answers that are forthcoming can constitute a legitimate and useful project. But such an inquiry is and should be seen to be much more modest and limited. It might be called something like “ADR’s Potential as an Alternative to Courts for Dispute Processing”.

The worst result would be for this project, having held itself out as a “fundamental” review of civil justice, to issue recommendations asserting that when issues involving dispute resolution are to be tackled by policy makers their essential options are courts or some variation of ADR. This would deny our history and blunt our capacity for imaginative and creative solutions to a wide variety of complex issues since many such solutions have relied on administrative processes.

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<sup>1</sup> The comment is 21 pages rather than the suggested 10. However, it is double spaced and the footnotes are included with the text. I plead compliance.



The answer to these questions in the initial documents is nowhere unambiguously stated. The “Ontario Civil Justice Review – Terms of Reference (App. I) and the “Civil Justice Review – Fundamental Issues Group” (App. II), while not expressly excluding the administrative state from the inquiry, do not specifically refer to it. Indeed, despite some broad statements, any specifics seem to focus on a comparison between courts and dispute resolution mechanisms directly related to courts, e.g., “Terms of Reference” – the list of areas to be covered in the Review’s mandate (p. iii). On the other hand, another document “Possible Research Issues” refers in two places to “tribunals” meant, I take it, to refer to the role of administrative actors.<sup>2</sup>

The Macdonald paper assumes that the administrative state is included.<sup>3</sup> Yet, that paper then states: “...civil justice problems in newly created fields of administrative law will be addressed in passing...”.<sup>4</sup> In fact, though a lengthy paper, it devotes little space to directly discussing administrative solutions as an option in tackling civil justice problems.<sup>5</sup>

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<sup>2</sup> August 30, 1994 (final). The two references are:

“2. How are disputes now being resolved?”

...

What kinds of matters are before tribunals?

...

3. How should choices be made between courts and other dispute resolution mechanisms?

...

Where and why are tribunals or ADR the preferred option?

...”

<sup>3</sup> R. Macdonald, Prospects for Civil Justice, *supra*, p. 12.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, p. 97: “...[I]t is not clear that these tribunals and agencies are any better than courts either at solving objective access to justice problems or at overcoming subjective barriers to access to justice.” See also pp. 35-36. There is also some discussion of administrative decision makers at pp. 132-133 as a basis of discussing “*ex post facto*” and “*ex ante*” supervision of “non-judicial dispute settlement mechanisms”.

The paper does provide a series of recommendations some of which could be applicable to administrative actors.<sup>6</sup> However, only two of these recommendations are explicitly stated to apply to them.<sup>7</sup>

Assessing the impact that litigation has upon social and political structure is a tricky business.<sup>8</sup> Yet, we can say that there is an historical pattern to how certain civil justice disputes have been assigned in this country: novel claims reflecting changes in society seeking recognition in the courts; a spurning by the judges; a recognition by the legislature, often through the administrative state.<sup>9</sup> This description would include: many women's issues, collective bargaining, occupational health and safety, compensation for work related injury, much of the response to environmental issues, (with important variations) competition policy, human rights, and issues of access within administrative decision making processes.<sup>10</sup>

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<sup>6</sup> I believe that the following proposals could apply to administrative actors: #2; #3; #7; #10; and #14.

<sup>7</sup> #1, advocating a system to generate data about civil disputing in Ontario should be established, indicates that that system should cover "administrative tribunals";

#5, advocates a review of the number and character of strictly adjudicative functions assigned to "statutory decision makers".

<sup>8</sup> For example, G. Rosenberg, *The Hollow Hope—Can Courts Bring About Social Change?* (Chicago: University of Chicago, 1991) arguing that litigation can almost never achieve substantial change and can be a barrier to change occurring. See also W.A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994), Ch. 2 "Litigation and the Question of Impact".

Needless to say, Rosenberg's book has been enormously controversial, though some of Rosenberg's critics in trying to dispose of him tend to underscore his central argument: see, eg, P. Schuck, "Public Law Litigation and Social Reform" (1993), 102 Yale Law Journal 1763 arguing that there is no creditable account of how courts exert their influence: "...we ...are guided more by our professionally honed, often intuitive grasp of an elusive social reality than by any robust scientific theory worthy of the name", p. 1785-86.

More to the point would be Sunstein's reaction: "[Rosenberg] has shown that there is room for much uncertainty about this matter [of consequences]. In any case, he has put into question the assumption of people who now believe... that litigation is an especially promising approach to social reform." See C. Sunstein, "How Independent Is the Court? *New York Review of Books*, 22 October 1992, 47, p. 50.

<sup>9</sup> H. Arthurs, "Jonah and the Whale: The Appearance, Disappearance, and Reappearance of Administrative Law" (1980), 30 University of Toronto Law Journal 225.

<sup>10</sup> Bogart, footnote 8 *supra*, Ch.4 "Women and the Courts: "...how things must be, forever?" and Ch. 5 "The Administrative State and Judicial Review".

To take only the last decade or so and only in this province we have, by way of example only, the following “fundamental” “disputes” which have been channelled, exclusively or in large part, through the administrative state:<sup>11</sup>

- no fault for automobile accidents
- the most extensive pay equity legislation in North America
- an Environmental Bill of Rights that de-emphasizes litigation and that underscores utilization of the administrative state<sup>12</sup>
- a Task Force that responded to bitter criticisms of the Ontario Human Rights Commission that nevertheless re-affirmed administrative agencies as the means to deal with human rights conflicts
- issues of access to information and of privacy
- generally applicable provisions requiring the implementation of employment equity
- substitute decision-making for the vulnerable
- attempts to improve access to certain administrative tribunals

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<sup>11</sup> I am by no means suggesting that these schemes are beyond second thought. For example, forceful critiques of no fault have been advanced by those who are, nevertheless, sympathetic to its larger goals: see, e.g., M. Trebilcock, “Incentive Issues in the design of ‘No-Fault’ Compensation Systems” (1989), 39 *University of Toronto Law Journal* 19.

The point of the list in the text is to illustrate the frequency with which policy makers continue to turn to the administrative state and the importance and complexity of the issues, in terms of the civil justice system, which are assigned to it.

<sup>12</sup> The Environmental Bill of Rights was, itself, a product of a variant on ADR, a process that is now being referred to as “Public Policy Mediation”. This process could be viewed as an important example of attempts at “anticipatory law reform” mentioned in “Civil Justice Review — Fundamental Issues Group” (App II).

This process essentially involves the government bringing interests critical to proposed legislation together. The interests are sometimes warned that if they cannot agree the government will not act. The interests are then “mediated” until essential agreement is reached about the legislation. The legislation is then drafted and introduced into the legislature on the explicit understanding that the implicated interests will support it. The recent class action legislation was also a product of “public policy mediation” as was, with important qualifications, pay equity. The process was tried with Standing/Intervention/Related Costs Issues and failed.



- massive reorganization of the supervision and control of the health care professions.

Reflection on the last paragraphs reveals something else about the administrative state of which we should take note. It is an alternative to the courts in terms of the variety it offers in how disputes can be resolved. Perhaps even more fundamental, it is an alternative to the courts in the creation of rights and entitlements.<sup>13</sup> I doubt if ADR will ever offer much potential in that second aspect: a derivation, as it often is, of the substantive law of judges. Could this bounded recognition of interests be part of ADR's attraction for some?

Those who are charged with determining the course of this project should clarify what it is they are about. If the project is confined to a direct comparison of courts and ADR that limited focus should be explicitly stated and maintained throughout. (That said it is not entirely clear what is meant to be covered regarding ADR;<sup>14</sup> a fundamental point of its own.). If, on the other hand, this project is to be a fundamental assessment of the options available to policy makers in the creation of claims and their resolution there needs to be a much more extensive and careful treatment of the variety, potential—and foibles—offered by administrative actors.

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<sup>13</sup> This fact also makes comparability between courts and administrative processes, difficult in terms of resources and how they are employed. For example, to what court function would freedom of information requests be comparable? Or the implementation of pay equity? There is a pay equity hearings tribunal. However, carrying out the decisions of that tribunal is not the primary way that pay equity is to be achieved. To what court function is the investigation and negotiation of human rights claims by the Human Rights Commission to be compared?

<sup>14</sup> For example, the document "Possible Research Issues", footnote 2, *supra* contains the parenthetical sub-heading "(Excluding Family Law)" (Despite this exclusion item 1, asking a question concerning the basic kinds of disputes people are involved in, lists "family" as an example.).

I do not see how one can conduct a review, even if limited to courts and ADR, without taking account of the use and controversy over the use of ADR in domestic disputing: see, eg, M. Shaffer, "Divorce Mediation: A Feminist Perspective" (1988), 46 *University of Toronto Faculty of Law Review*; M. Bailey, "Unpacking the 'Rational Alternative': A Critical Review of Family Mediation Movement Claims" (1989), 8 *Canadian Journal of Family Law* 61; N. Hilton, "Mediating Wife Assault: Battered Women and the 'New Family'" (1991), 9 *Canadian Journal of Family Law* 29; C. Richardson, *Court-Based Divorce Mediation in Four Canadian Cities* (Ottawa: Supply and Services, Canada, 1988); *Report of the Attorney General's Advisory Committee on Mediation in Family Law* (Toronto: Ministry of the Attorney General, 1989).

Initiatives are already under way regarding ADR and domestic disputes: see, e.g., (no author), *ADR and Other Initiatives in Ontario* (no date) (circulated with McCamus letter of 19 October 1994), pp. 7-8. It is possible to imagine that an ultimate conclusion of the Review would be to put resources into other areas. But that is a different issue. In any event, should such a conclusion be reached by excluding domestic issues right from the beginning of the project?

## (b) ISSUES OF ACCESS

### (i) Financial Barriers

There is a lengthy discussion in the Macdonald paper on "Recognizing and Overcoming Barriers to Access to Justice". I want, in this section, to focus on the more specific issues of costs.

For some time a powerful case has been assembled documenting the inequality that can exist in litigation because of the different attributes of the litigants.<sup>15</sup> Prominent among these attributes is disparity in financial resources.<sup>16</sup>

Ontario does have an extensive legal aid system based both on a certificate program and clinics. The bad news is that financial strain is loudly knocking at its door. In any event, the focus of legal need is the very needy and especially those facing criminal charges.

For the most part the order of the day in civil litigation is that losers pay winners' costs. As an abstraction, such a rule is attractive in discouraging frivolous claims and defences and comports with theories of formal equality. As a reality, it can have a prohibitive impact on individuals and groups seeking to raise important issues of public policy, particularly when their adversaries—frequently governments or big corporations—are far better able to absorb or pass on the costs of such litigation.

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<sup>15</sup> M. Galanter, "Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change" (1979), 9 Law & Soc. Rev. 95.

<sup>16</sup> It might be thought that, as someone who is sceptical about the capacity of using courts to achieve progressive change (see footnote 8 *supra*), I would not be particularly keen on reform that would facilitate access to courts.

My scepticism does not extend to saying that there is not an important role for courts in Canadian society. Rather, it claims that there are good grounds for asserting it should be a limited one. In any event, whatever the role of the courts is to be it should not rest on a base of inequality of access. Boundaries to the courts' role should be established by persuading people not by exploiting devices premised on inequality.

There have been some limited, specific attempts to redress such imbalance.<sup>17</sup> Good examples, that should be closely examined (including their actual impact), are Quebec's<sup>18</sup> and Ontario's<sup>19</sup> class action mechanisms and their costs devices. The most important innovation—at the federal level and confined to federal legislation—was the Court Challenges Program. Though limited financially, the purpose of the program was to allow groups intended to benefit from the Charter "... to clarify and advance the rights of all members of the disadvantaged group".<sup>20</sup> (There was also a separate program for Amerindian issues.<sup>21</sup>) The Court Challenges Program was eliminated in 1992 and very recently resurrected by the new Liberal government, though important details of the Program are still not clear.<sup>22</sup>

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<sup>17</sup> In contrast are the various ways that problems of access have been addressed—again, by no means beyond criticism—in the administrative state. For example, one way is to alter the substantive law to encourage those who need redress to come forward, e.g., a shift to no fault. A second way is to underwrite the entire process for claimants (with constraints and controls within that process) when the nature of the entitlement is judged to be basic, e.g., human rights. A third is to utilize the various mechanisms available—education, standard setting, monitoring etc.—to facilitate the realization of a program employing adjudication as a back-up with decision-makers separate from the rest of the entity, e.g., pay equity in Ontario.

Yet a fourth is to underwrite directly by various means the costs of certain participants in the process: see, W.A. Bogart and M. Valiante, *Access and Impact: An Evaluation of the Intervenor Funding Project Act, 1988* (Toronto: Ontario Ministry of the Attorney General, 1992). See also, M. Valiante and W.A. Bogart, "Helping 'Concerned Volunteers Working out of their Kitchens': Funding Citizen Participation in Administrative Decision Making" (1993), 31 O.H.L.J. 687. See also Commission on Planning and Development Reform in Ontario, *New Planning for Ontario: Final Report Summary and Recommendations* (Toronto: Commission on Planning and Development Reform, June 1993), 39-40.

<sup>18</sup> Book IX, Code of Civil Procedure; R.S.Q. Ch. 2.1 arts. 6-19.

<sup>19</sup> *Class Proceedings Act, 1992*, S.O. 1992, c. 6 and the *Law Society Amendment Act (Class Proceedings Funding)* 1992, S.O. 1992, c. 7.

<sup>20</sup> Court Challenges Program, *Information Sheet: Funding for Equality Cases* (Ottawa: Court Challenges Program, 2 November 1990).

<sup>21</sup> Indian and Northern Affairs Canada, *Indian Test Case Funding: Terms and Conditions, Contribution Program* (Ottawa: INAC, 1990).

<sup>22</sup> Telephone conversation: Pat File, Interim Coordinator, Court Challenges Program and W.A. Bogart, 26 October 1994; *Media Release*, 24 October 1994.



Fortunately, the Ontario Law Reform Commission has a record of addressing problems of financial barriers in litigation. Its *Report on Class Actions*<sup>23</sup> was a foundation for the recent Ontario legislation. That Report demonstrated keen awareness, going well beyond the immediate issues surrounding class actions, that reform of any substantive law or procedural devices can be hollow if concerns about access are not responded to as well.<sup>24</sup>

In its 1989 *Report on the Law of Standing* the Commission made a set of “fundamental” recommendations. A party could be immunized from costs (but could receive costs if successful) where the other party had a clearly superior capacity to bear the costs of the proceeding, certain other criteria were met, and the immunized party conducted the litigation in good faith.<sup>25</sup> This recommendation, appropriately refined, could go a long way in refocussing awarding of costs in litigation from an exercise in formal equality to some recognition of substantive equality in achieving access.

My purpose here, of course, is not to seek agreement that this recommendation is precisely the way to tackle problems of financial inequality in litigation. Nor am I suggesting that there is necessarily but one way to address

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<sup>23</sup> Ontario Law Reform Commission, *Report on Class Actions* (Toronto: Ministry of the Attorney General, 1982); see particularly Volume I.

<sup>24</sup> See also in this regard: Ontario Law Reform Commission, *Report on Damages for Environmental Harm* (Toronto: Ministry of the Attorney General, 1990).

<sup>25</sup> Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989). See, Ch. 6 “Costs” and see also Draft Bill, ss. 5, 6, 7 and 8 (the last dealing with costs and intervenors). S. 5(1) states the core of the recommendation:

(1) No costs shall be awarded against a person who commences a proceeding where,

- (a) the proceeding involves issues the importance of which extends beyond the immediate interests of the parties;
- (b) the person has no personal, proprietary or pecuniary interest in the outcome of the proceeding or, if he or she has such an interest, it clearly does not justify the proceeding economically;
- (c) the issues have not previously been determined by a court in a proceeding against the same defendant; and
- (d) the defendant has a clearly superior capacity to bear the costs of the proceeding

unless the conduct of the person who commences the proceeding is vexatious, frivolous or abusive.

such inequality. Rather, my goal is to insist that any project that does not address questions of substantive equality in terms of access to courts or any other device for dispute resolution cannot claim to be a “fundamental” review. Perhaps a particular obligation is placed on the Ontario Law Reform Commission, in its involvement in this enterprise, given its previous commitments to such issues.

## (ii) Diversity

It is a sad truth that attention to the variety that is this society too often slides into atomism and just plain bad feelings.<sup>26</sup> That is why those who are in a position to lead should attempt moderate and constructive engagement of issues of diversity.

I come back to the “fundamental” point. If this review purports to be “fundamental” then it should face such issues. As one example, how could there be a “fundamental” review of ADR without taking account of possibly the oldest alternative to the courts: decision making and dispute processing by Amerindians?<sup>27</sup> Especially when First People have so little faith in the system of justice of the dominant culture?<sup>28</sup> Or, again, to what extent will this review be

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<sup>26</sup> But there is also work that is inspiring, for instance, the writings of Charles Taylor: e.g., “Alternative Futures — Legitimacy, Identity, and Alienation in Late Twentieth Century Canada” in A. Cairns and C. Williams, *Constitutionalism, Citizenship, and Society in Canada* (Toronto: University of Toronto Press, 1986) and *Multiculturalism and “The Politics of Recognition”* (Princeton University Press, 1992) (commentary by A. Gutmann *et al.*).

<sup>27</sup> The Macdonald paper, *supra*, contains some references to relevant literature: see that paper’s footnotes 110 and 116.

<sup>28</sup> W.A. Bogart and Neil Vidmar, “Problems and Experience with the Ontario Civil Justice System: An Empirical Assessment” in A. Hutchinson (ed.), *Access to Civil Justice* (Toronto: Carswell, 1990) 1, pp.38-40.

(The Bogart and Vidmar study, funded by the Ministry of the Attorney General, had three components:

- (1) a telephone survey of 3,000 households inquiring if they had had a serious problem that could potentially be part of the Ontario system of civil justice and, if so what they did about it;
- (2) a series of focus groups to obtain a more complete picture of how people make choices concerning problems that may become legal issues and also how they react to the legal system and its actors;
- (3) two sets of attitudinal questions asked in the telephone survey:

“fundamental” if it does not attempt to grapple with the complaints of minorities concerning their lack of faith in the justice system and its unresponsiveness to differing cultural values?<sup>29</sup>

We are fortunate to have the individuals we do have coming to the meeting on the 19 of November Symposium. However, the criteria employed to invite people are not clear. I wonder if those charged with deciding might have also availed themselves, at this meeting, of the advice of others.<sup>30</sup>

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- (a) those who had a grievance were asked questions about the outcome and their level of satisfaction—about delay, cost, and appropriateness of fees charged by lawyers;
  - (b) all respondents, whether or not they had a grievance were asked questions about: knowledge of their rights; whether they considered the legal system fair; whether they would expect great delay if a problem required legal action; whether they saw themselves as victims of business or government;—and—whether they believed alternative methods of resolving disputes should be available and employed.

Related papers, building on this study and similar ones in the United States, England and Australia, are: H. Kritzer, W.A. Bogart, N. Vidmar, “The Aftermath of Injury: Compensation Seeking in Canada and the United States” (1992), 25 *Law and Society Review* 499; H. Kritzer, W.A. Bogart, N. Vidmar “To Confront or Not to Confront: Measuring Claiming Rates in Discrimination Grievances” (1992), 25 *Law and Society Review* 875; and, H. Kritzer, W.A. Bogart, N. Vidmar, “Context, Context, Context: A Cross-Problem, Cross-Cultural Comparison of Compensation Seeking Behaviour”, a paper presented at the Law and Society Conference, Amsterdam, June 1991.

For another study containing related information, including a more limited telephone survey: see W.A. Bogart and Neil Vidmar, *Report to the Ontario Task Force on Independent Paralegals “An Empirical Profile of Independent Paralegals in the Province of Ontario”* (1989).

<sup>29</sup> For example, Mary Cornish, Chair, Ontario Task Force, *Achieving Equality: Report on Human Rights Reform* (1992); B. Etherington *et al.*, “Preserving Identity by Having Many Identities”: *A Report on Multiculturalism and Access to Justice* (Ottawa: Department of Justice, 1991); B. Etherington (in consultation with W.A. Bogart, P. Li, and E. Thornhill) *Review of Multiculturalism and Justice Issues: A Framework for Addressing Reform* (Ottawa: Department of Justice, 1993).

<sup>30</sup> The following is a non-exhaustive and illustrative list of twelve people who I believe could say much about issues of diversity but, also, about what constitutes the fundamentals of review:

[(ed. note) Names of individuals deleted with Professor Bogart’s consent.]

It should be noted that the consultation in which Professor Bogart participated is merely one of a series of consultations which, from the outset, the Fundamental Issues Group of the Civil Justice Review had planned to undertake.



There are many sins of intolerance: attempting to close intellectual borders is one of them. Yet the result of the invitations is that of the twelve people invited only four are from Ontario. Further, there are only three women and there is not one woman from Ontario. Finally, so far as I am aware, there is no other representation of diversity.

### III. COMMENTS ON PROPOSALS IN THE MACDONALD PAPER

#### (a) Proposals for Civil Justice Review(App. III)

##### (i) This Question of Impact

The Macdonald paper suggests initiatives that are potentially very important.<sup>31</sup> An important thrust of these proposals I would summarize in terms of impact. By this I mean that such proposals focus on ascertaining the consequences of legislative initiatives for the civil justice system. I believe the following recommendations are so focussed: #2; #3; #4 and #5 (to some extent); and #14. (Again, I have difficulty ascertaining how, if at all, these recommendations are meant to apply to administrative actors: #3—"regulatory audits of administrative programmes?"")

The good news is that there are already some attempts to gauge consequences by the Ontario legislature.<sup>32</sup> This suggests that the Macdonald

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The organizing principle for the event in which Professor Bogart participated was to draw together a small group of academic researchers with long and established track records in the field of research on the administration of civil justice in order to obtain advice with respect to existing bodies of research that might be useful to the Group and suggestions for further research that might need to be done by the Group.

The Group had also arranged, however, a series of consultations with additional panels of individuals organized with a view to obtaining advice and input from a wide variety of groups and interests affected by the civil justice system. In addition to the academic panel, then, panels were struck under the following headings: alternative dispute resolution, anti-poverty, business/consumer, women, visible minorities, disabled, aboriginal and francophone.]

<sup>31</sup> See, *supra*, p. 157, Appendix III, Consolidated List of Proposals for Civil Justice Review Research Projects.

<sup>32</sup> For example:

(1) See the assessment, required by the Act, by Bogart and Valiante of the *Intervenor Funding Project Act*, footnote 17 *supra*;

(2) Both the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* require that

proposals are bolstering an idea that has already found favour with policy-makers and politicians. The bad news is that such efforts are expensive and very time consuming;<sup>33</sup> not always acted upon;<sup>34</sup> and can be subject to factors that shift very rapidly.<sup>35</sup> Perhaps more important, very difficult questions can arise about what consequences will be measured, how they will be measured, and what perspective is being used to measure them.<sup>36</sup>

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“comprehensive review” be carried out by the Standing Committee of the Legislative Assembly and that there be recommendations to the Legislative Assembly within one year after beginning that review;

(3) The *Regulated Health Professions Act* constitutes an Advisory Council with a general obligation for monitoring. In addition, the Advisory Council has very specific obligations to report, within five years, on the effectiveness of: (a) each College’s patient relations and quality assurance programs and (b) each College’s complaints and discipline procedures with respect to professional misconduct of a sexual nature;

(4) The Environmental Bill of Rights contains a number of evaluative mechanisms, prominently the role of the Environmental Commissioner, an independent officer who will oversee and report directly to the legislature on the implementation and operation of the Bill.

It will be observed that all four examples are drawn from the administrative state.

<sup>33</sup> For example, the Bogart and Valiante assessment, footnote 17 *supra* with a comparatively narrow focus took four months and cost \$75,000.

<sup>34</sup> Some might say that about example (2) in footnote 32 *supra*.

<sup>35</sup> This might be said about intervenor funding; discussion, M. Valiante and W.A. Bogart and Joint Meeting of the Environmental Assessment Board and the Ontario Energy Board, November 1993.

<sup>36</sup> For example, M. Friedland, M. Trebilcock, K. Roach, *Regulating Traffic Safety* (Toronto: University of Toronto Press, 1990), especially pp. 143-152.

Examples abound of the problems that can be caused by the issue of unintended consequences. See, eg, the debate over “no fault” divorce—there are those domestic issues again (footnote 13 *supra*): compare, eg, L. Weizmann, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (New York: The Free Press, 1985) and H. Jacob, “Another Look at No-fault Divorce and the Post-Divorce Finances of Women” (1989), 23 *Law & Society Review* 95. For an interesting (not necessarily right) journalistic account of another set of unintended consequences see: D. Polsby, “The False Promise of Gun Control” *The Atlantic Monthly*, March 1994, 57.

For one successful engaging brilliant roam across time, culture, and disciplines in terms of law and its (unhappy) consequences: see R. Posner, *Sex and Reason* (Cambridge: Harvard University Press, 1992).

In addition, in the midst of a Review focussed on courts (whatever else it is focussed on) any initiatives regarding impact should also include assessing the effects of the courts themselves. Such impact can occur, among other ways, through the creation of new causes of action (or the failure to so create), bounding the activities of administrative actors through judicial review of administrative actors, and, limiting the scope of policy makers and politicians through federalism review and, of course, the Charter.

I would be the first to acknowledge the complications and controversy in such an enterprise<sup>37</sup>. Nevertheless, most of the writing on impact in this country has focussed on concerns about the consequences of judicial activity, including its interactive effects with legislatures.<sup>38</sup>

None of the foregoing is to speak, in principle, against the Macdonald proposals listed above. Rather, it is to suggest that the Ontario Law Reform Commission, if it does anything in this regard, begin by sponsoring a more focussed project that would recommend the best way to address and gauge issues of impact on the civil justice system. Such a project should include all components of the system, specifically including courts.

## (ii) Educating Law Schools

Proposal #7 directed to legal education makes a very good point about the responsibilities of law schools and the legal profession. If the Ontario Law Reform Commission has the time and resources to get involved so much the better. At the same time this recommendation could be taken up by the law schools themselves; perhaps through the Council of Law Deans.

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<sup>37</sup> See, e.g., the sources cited in footnote 8 *supra*.

<sup>38</sup> For example (books only): P. Monahan, *Politics and the Constitution: the Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell/Methuen, 1987); M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989); R. Knopff and F.L. Morton, *Charter Politics* (Toronto: Nelson, 1992); C. Manfredi, *Judicial Power and the Charter* (Toronto: McClelland & Stewart, 1993); Bogart, footnote 8 *supra*, (1994). For an important historical study of the interactive effects of courts and legislatures see: E. Tucker, *Administering Danger in the Workplace — The Law and Politics of Occupational Health and Safety Regulation in Ontario 1850-1914* (Toronto: University of Toronto Press, 1990)



### (iii) Survey Research

The studies mentioned in footnote 28 would appear to be relevant to this proposal.<sup>39</sup> The possibility of research that would appear to be related to the studies in footnote 28 is also raised in “Possible Research Issues.”<sup>40</sup>

Neil Vidmar and I would be happy to discuss these studies, done for the Ministry of the Attorney General, should there be any interest in their relevance. Such discussions might address the potentials of this kind of research but also what can be severe limitations and the substantial time and cost that is involved.

### (b) PROPOSALS FOR ALLOCATING DISPUTES (APP. V)

There are a number of comments that could be made about these proposals. (Such comments would include questions about the proposal to remove disputes between corporations from courts (see I. 5. and 6).) Are there not questions about corporate law and governance that we want subjected to the scrutiny of courts that do not turn on whether an individual (see I. 3) is involved?

Here I will focus on the “Introductory Note” and some questions about its recommendations concerning costs since I do not understand them. Earlier, I discussed “Financial Barriers” (II.B.i) and I will not repeat any of those remarks.

The proposals, “Introductory Note”, make several statements. Quite apart from whether I agree with them or not I do not see how they fit together. They are:

- “...when the expression Ontario Court (General Division) is used, this means that current rules about the cost of litigation should be maintained.” (first paragraph) *supra*, p. 165.

- “...whenever the balance of social power lies heavily against a physical person, the mechanism adopted should be designed, at least in part, to rebalance that disparity of social power.” (second paragraph) What does this mean? How would the “rebalance” be achieved? How does this statement and the statement, first quoted just above, fit together? *supra*, p. 165.

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<sup>39</sup> See also the paper itself: Macdonald, *supra*, pp.22-25.

<sup>40</sup> *Supra* footnote 2, item 1.



# A SOLUTION IN SEARCH OF A PROBLEM

Owen Fiss\*

For a good part of this century, Americans have been fascinated with arbitration, mediation, and a number of other processes that are now collectively grouped under the heading of ADR. The current interest in ADR can be traced, however, to the late 1970s, when ADR emerged as an integral part of the reactionary politics of that era.

There were many themes and currents in the 1970s, but among the most significant was the almost unrelenting attack upon the judicial activism associated with the Warren Court. In 1976, the then Chief Justice, Warren Burger, gave the critique a new twist. He urged a turn away from the courts and an increased use of those dispute resolving processes that were more dependent on the consent of the participants—all the participants, the perpetrator of the alleged wrong as well as the victim.<sup>1</sup> Presumably, the institutions empowered by those processes—for example, mediation or arbitration—would pose less of a threat to the status quo than would an independent judiciary.

During the 1980s, ADR grew in its popular appeal and its constituency broadened, especially thanks to a highly publicized report issued by Derek Bok, the President of Harvard University and a public figure long associated with liberal causes.<sup>2</sup> Not only did ADR accord with the emphasis upon individual consent that so dominates American political traditions, but it also drew upon the distrust of government that brought Ronald Reagan to power in 1980 and that was deftly exploited by him throughout his presidency. In time, ADR became the judicial wing of the privatization movement.

As it matured, the claim advanced on behalf of ADR became more focused. In its early phase, ADR was used to confront the judicial power in all its fullness; it purported to be applicable to all manner of cases, including the most controversial ones, for example, those involving claims of racial discrimination. But during the eighties, perhaps due to the broadening of the constituency supporting it or in response to criticism of the initial formulation, ADR was

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<sup>1</sup> Burger, *Agenda for 2000 A.D. — A Need for Systematic Anticipation*, 70 F.R.D. 83, 93-96(1976). See also 68 A.B.A.J. 274 (1982).

<sup>2</sup> Bok, *A Flawed System*, *Harv. Mag.*, May-June 1983, at 38, reprinted in *N.Y.St.B.J.*, Oct. 1983, at 8, *N.Y.St.B.J.*, Nov. 1983, at 31, excerpted in 33 *J.Legal Educ.* 570(1983). Cf. *New York Times* Editorial, April 23, 1983, Section 1, page 22, column 1; *New York Times*, April 22, 1983, Section B, page 1, column 1.



largely presented as part of a “two track” strategy: some cases were suitable for adjudication, others for ADR. As a result, the principal challenge facing those committed to ADR became one of establishing criteria for dividing or allocating the cases traditionally handled by courts between these two tracks.

Over the course of centuries, civil procedure has become a system with many tracks. In the past, the reform process typically began with “the problem”—a widespread perception or political judgment that courts were not satisfactorily handling a certain category of cases. Then formal criteria were formulated that more or less identified the category of cases than were to be taken away from the courts. Eventually a new method of processing these cases was devised. Labor arbitration, seen as a way of avoiding the onerous decisions of a hostile judiciary, evolved in this manner during the early part of the twentieth century. Today, however, we have become so enraptured with ADR that the reform process appears to have reversed itself. We start with the technique and then search for a category of cases to which it may be applied.

To be sure, there is nothing inherently wrong with reversing the process of reform, but it does present two difficulties. First, it adds to the burden of reform. Without defining the problem addressed, it is difficult to structure the reform measure with any specificity. In the case of ADR, this difficulty has manifested itself in the attempt to formulate the criteria needed to make the two-track strategy operational. We can agree with Frank Sander that we should make “the forum fit the fuss”,<sup>3</sup> or in terms of the new formulation, that we should have “courthouses with many doors.” But we remain at a loss to know which cases should be handled by the courts, which by ADR. Second, we are always likely to be disappointed by the results. Today, ADR is primarily promoted on the theory that it will cut costs and avoid delay, but as Deborah Hensler points out, the empirical evidence indicates that it has no such effect. As she says, ADR has produced “little in the way of aggregate time and cost savings.”<sup>4</sup> This should not come as a surprise, since the reform process is driven more by a fascination with the new fangled technique than a sober appraisal of social needs. Unfortunately, we often lose sight of this point.

Despite these misgivings, ADR now has a global sweep and is of great interest to many countries throughout the world, Canada included. As Garry Watson describes it, Canada does not have an ADR tradition of its own, but seems to be trying to jump on the “new bus.”<sup>5</sup> Since this flurry of activity is occurring, to extend Watson’s metaphor, 20 years after the bus left the depot,

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<sup>3</sup> Frank Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79 (1976).

<sup>4</sup> Deborah R. Hensler, *infra*, p. 236.

<sup>5</sup> Garry Watson, *infra*, p. 297.

Canada takes ADR in its more mature form, not as a broadside attack on the judiciary, but in its multi-track variety. The principal challenge has, therefore become one of defining the criteria for allocating the cases between the tracks. Which cases should remain in the courts? Which ones should be channelled to ADR? Yet the little evidence that I have indicates that Canada—like many countries throughout the world—is engaged in what I have called a reverse reform process, and as a result has burdened itself with an almost impossible task.

The Civil Justice Review Task Force envisions three or four tracks, rather than two, insofar as it wisely understands that ADR could have a publicly funded component. In its charge to the Fundamental Issues Group, the Review begins with a distinction among (a) courts, (b) publicly funded dispute-resolving mechanisms that are not courts (e.g. administrative agencies or publicly funded mediators or arbitrators), and (c) private dispute-resolving mechanisms (which could include privately funded courts, for example, those belonging to a religious order, as well as privately funded mediators and arbitrators). It then turns to the Fundamental Issues Group to develop criteria for allocating the civil docket among these various institutions.

Of course, the problem to be solved is identified—in reform efforts, one always is—but that problem is described with such generality and superficiality as to suggest that the entire reform process is proceeding backwards. In its Terms of Reference to Civil Justice Review, the Ontario Task Force pays homage to the judiciary and acknowledges the contribution the judiciary has made to justice, but then, by way of identifying the problem to be addressed, has nothing more to say than: “In recent time, however, because of the pressures of modern litigation, such justice has come at great expense to the litigants, and, too often, after numerous and lengthy delays.”<sup>6</sup>

Professor Macdonald has done the spade work for the Fundamental Issues Group and has labored mightily under his charge—his report is learned, insightful, nuanced, and in countless other ways admirable. Everyone has a lot to learn from it. But the truth of the matter is it does not supply the criteria the Review is seeking and that are needed to implement the two track strategy. Macdonald approaches the task before him with caution and doubt. He pleads for more information and experience, and seems deeply skeptical about the entire reform process, perhaps because he understands that it is proceeding backwards. Indeed, Macdonald’s report may be read as a studied refusal to answer the question put to him—a kind of academic stonewalling, which, in this instance, I heartily endorse.

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<sup>6</sup> Ontario Civil Justice Review — Terms of Reference, p.1, *supra*, p. 149.

Professor Macdonald first considers the possibility of using justiciability as the allocative criterion. Disputes are to be allocated between courts and ADR mechanisms depending on whether the dispute is suitable for adjudication. He concludes, after a lengthy review of the American legal process literature, that this approach does not appear “encouraging”.<sup>7</sup> In this conclusion, Professor MacDonald is on firm ground; indeed, I would be a little harsher. The legal process school has never developed an adequate standard for deciding which cases are justiciable and which are not.

The most sustained effort in this regard has been Lon Fuller’s notion of “polycentrism”, but, as I have pointed out elsewhere, Fuller never satisfactorily explained why courts cannot handle polycentric disputes or why they can be handled better by arbitrators or mediators.<sup>8</sup> Speaking more generally, I think it fair to say the experience of the 1960s in the United States—which involved the courts in school desegregation cases and all manner of structural reform litigation—suggests that no easy divide exists between disputes that are justiciable and those that are not. In fact, the experience of the Warren Court era suggests just the opposite. I read the history of that period to indicate that, in one way or another, all disputes could be formulated or reformulated in terms that make them amenable to adjudication.

At one point, Professor Macdonald mentions two types of disputes that he believes are not justiciable—custody hearings and commercial reorganizations. He writes, “Legal process analysis will permit the identification of various claims and entitlements currently allocated to the courts for decision that, as currently formulated, do not respond to the fundamental logic of adjudication (for example, custody hearings and commercial reorganizations).”<sup>9</sup> I cannot speak to the Canadian experience, but in the United States both types of cases have been routinely handled by the courts; in fact, railroad reorganization was an important part of the civil docket of the federal courts in the late nineteenth century. In any event, note in the quoted sentence Macdonald’s qualification “as currently formulated.” A couple of lines later, he acknowledges that legal process cannot “guide the legislator in deciding whether... certain disputes should still be allocated to any particular dispute resolution institution.”<sup>10</sup> Aside from the theoretical adequacy of the justiciability criterion, I wonder whether it is, as a purely pragmatic matter, responsive to the question put to Macdonald. Like most

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<sup>7</sup> Roderick A. Macdonald, *Prospects for Civil Justice*, *supra*, p. 121.

<sup>8</sup> Owen Fiss, *The Forms of Justice*, 93 Harv. L. Rev. 1, 42 (1979).

<sup>9</sup> Macdonald, *supra*, p. 122. The quoted passage has been slightly revised in the published version of the Macdonald paper.

<sup>10</sup> *Id.*



of those attracted to ADR, the Ontario Civil Justice Review starts with the existing civil docket now burdening the courts and asks whether some of these “cases” can be diverted to other dispute-resolving institutions (public or private). In framing the question this way, the Review presupposes that the disputes to be resolved are justiciable—after all they are already “cases”—and thus justiciability cannot possibly be used as the sorting criterion.

After he considers the justiciability criterion, Professor Macdonald addresses the possibility of implementing the two track strategy through a social ranking system—one that seeks to determine the relative importance of different kinds of disputes. Courts get the “important” cases, ADR institutions get the “trivial” ones.

In this context, Professor Macdonald makes two points with which I agree: first, that there can be no objection on principle to social rankings, and second, that such rankings are often implicitly made in the existing legal system (e.g., Small Claims Courts). A consensus seems to be emerging that “construction lien” cases should be taken out of the courts and put somewhere else. So be it. What troubles Professor Macdonald is the movement from implicit rankings, ones that have evolved over time, piecemeal, presumably in response to the development of a shared understanding, to a system of rankings that is explicit and fully comprehensive, imposed from the top down at a single moment in history. As Professor Macdonald, always the master of understatement puts it, “Admittedly, the elaboration of a multi-dimensional civil disputes points system reflects the rationalistic spirit carried to the extreme.”<sup>11</sup>

I am probably more a believer in rationalism than Professor Macdonald, so I would not emphasize the intellectual difficulty of constructing the imagined comprehensive system of ranking, though it is obviously an enormously complex task. Rather, my concern is of another nature, arising from doubt as to whether such a comprehensive ranking scheme would be responsive to the social problem that presumably fuels this inquiry. Let us assume, as appears always to be the situation, that the caseload of the judiciary is “too great.” Can the overload be due to the number of “trivial” cases before the courts? Of course, the number of filings of such “trivial” cases may be large, perhaps much larger than the “important” cases, but I suspect that the resources of the judiciary are primarily consumed by the “important” cases. “Trivial” cases can be and probably are handled by judges expeditiously, or settled.

I also fear that the social ranking criterion Macdonald envisions may prove to be counterproductive in practice. A comprehensive ranking system would require a screening mechanism that would require a judge or some court official to peek at the litigation that will eventually ensue. Such a peek will only

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<sup>11</sup> Macdonald, *supra*, p. 126.

compound delays and costs. Over the years we have become increasingly dissatisfied with ranking systems that look only to the status of the litigants (individual v. organization), the dollar amount of the claim, or the formal category of the law (e.g., family matters)—the easily administered criteria.

At one point in this report, Professor Macdonald makes use of a number of such easily administered criteria. In Appendix V, he lists 19 rules for determining which cases should be handled by the Ontario Court (General Division) and which should be handled by ADR mechanisms. Some of these rules, particularly those listed under the heading “Structure of the Dispute,” are subject to the criticism just voiced—they will be counter-productive because they require an elaborate screening process. An example might be the proposed rule denying the Ontario Court (General Division) jurisdiction over any matter in which expert witnesses are required to prove either causation or economic damages. Others, like the rule saving the courts for cases involving “physical persons” or denying it jurisdiction over “commercial disputes,” might be more easily administered. But, as pointed out by George Priest, the exclusions effectuated by this criteria could not possibly be justified on the ground that they are “trivial” or, for that matter, on the basis of the allocative criteria analyzed or discussed by Professor Macdonald.<sup>12</sup> Indeed, such exclusions seem to express certain normative considerations, a kind of Canadian populism, that are never fully articulated, let alone defended, by Macdonald in his report. In the preface to the list of the 19 proposed rules, Professor Macdonald warns that the list is only “intended to stimulate discussion about values implicit in debates about alternative dispute resolution.” He then adds, “This list itself has no intrinsic value.”

After considering justiciability and social ranking, Professor Macdonald addresses the possibility of using consent or individual choice as an allocative criterion. Note that here, consent is not used to justify the preference for the solutions arrived at by certain ADR mechanisms (say, mediation or bilateral negotiation), but rather as sorting criterion, that is, as a basis for determining which cases should be handled by the courts and which ones by ADR. Under this theory, a dispute should be taken out of the courts and given to some other institution if all the parties genuinely agree to that placement (either at the time the disagreement arises or in a contract they enter beforehand).

I, for one, believe it more difficult to apply the consent criterion than Professor Macdonald allows. He acknowledges the risks of coercion and inequalities of bargaining power, but is not sufficiently attentive to the interests of third parties. That too would vitiate the normative force of the consent by litigants, and constitute a sufficient reason for not making the consent of the

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<sup>12</sup> George L. Priest, *Channeling Civil Litigation: A Comment on Civil Justice Reform in Ontario*, *infra*, pp. 245-46.

litigants dispositive. Many of the cases where the state mandates a judicial forum are precisely where third party interests may be in jeopardy, e.g., the dissolution of marriage. Moreover, even when the state allows choice, there may be good reason for second guessing the choice of forum or terms of settlement by the named parties. The litigants speak not just for themselves but may well be advancing the claims or defenses of social groups or organizations; their actions may compromise the rights of others. Almost obsessed by our individualistic ideology, we in the United States tend to slight the group dimensions of litigation. However, Canada has a much richer and more sophisticated understanding of group rights and thus should look more skeptically on the assumption usually made by ADR advocates that the conditions for true and genuine consent are present. This skepticism is particularly appropriate in the high profile cases that consume judicial resources and provoke political controversy.

But let us assume that the consent can be successfully obtained. Even then, I doubt whether treating individual choice as an allocative criterion will yield the results that the proponents of ADR promise. It is true, as Professor MacDonald points out, that there are a number of special situations where the state requires the parties to go to court even if both parties negotiate a settlement or agree to go through another kind of dispute resolution mechanism to resolve their disagreement. Mediators can work out a property settlement, but not dissolve a marriage even when it is childless. These situations are, however, relatively rare in number and cannot plausibly account for much of the judicial workload. Thus, even if we remove all bars to the choice of forum, it is hard to believe that we would have contributed much to alleviating what the Terms of Reference describes as “the pressures of modern litigation.”

What the proponents of ADR want is not simply free choice among fora, which basically exists, but rather incentives, strong incentives, to guide that choice in favor of ADR, for only then would there be any meaningful diversion from the courts to alternative institutions. In that spirit, sometimes the search for strong incentives yields rules that are in fact coercive (e.g., in some jurisdictions in the United States a submission to arbitration is sometimes imposed as a condition of judicial access). In any event, whether we deal with incentives or coercion, we still need to identify the category of cases to which the incentives (or coercion) is to be applied—and consent or choice cannot be used for that purpose. Consent is the object acted upon and thus cannot be the sorting criterion

At one point, Professor Macdonald appears to follow the lead of the proponents of ADR. In the conclusion of his consideration of the consent criterion, he states, “the legislature should not be reluctant...to influence the streaming choices of individual litigants.” But in failing to supply a criterion—choice can’t be it—that would identify the cases where that influence should be applied, he leaves the Fundamental Issues Group pretty much as it started—searching for the allocative criteria needed to make ADR operational.



Of course, Macdonald may believe that the incentives favoring ADR mechanisms should be created for *all* cases, and there is language on the page from which the last quotation is taken suggesting that is his view. But that is only to abandon the (pretense of the) two track strategy and return ADR to the form in which it was originally presented in the United States—as an expression of an unspecified unhappiness with the courts or government in general.

# REDESIGNING THE ICEBERG: REFORMING A LARGELY UNCHARTED AND EVER-CHANGING CIVIL JUSTICE SYSTEM

Marc Galanter \*

1. Professor Macdonald's study paper usefully reviews many issues relevant to the task at hand, displaying the conceptual and policy perplexities that lurk in every decision. Rather than attempting to respond to its many insightful observations, I have taken the course of providing a few general thoughts that I believe deserving of attention in the task of mapping out the Commission's work.

2. Mention is made of general public's disillusion and unhappiness with the system and with the professionals who staff it. In the United States, the contours of this discontent are surprising. In an apparent reversal of the historic perception of lawyers as pillars of the establishment, a 1993 survey found that:

...Americans who are more critical than average tend to be more establishment, upscale, and male. The higher the family income and socioeconomic status, the more critical the adults are. Pluralities of college graduates feel unfavorably toward lawyers, while pluralities of non-college graduates feel favorably.

By an large, those who see lawyers in a more favorable light than average tend to be downscale, women, minorities, and young....<sup>1</sup>

3. Generally, the major attacks over the past decade on the U.S. civil justice system as pathologically overextended and detrimental to economic well-being have come from elites—manufacturers, insurers, doctors—and their political and media allies. Popular discontents with lawyers and law have also intensified, but remain distinct from elite criticism.<sup>2</sup> Although we have no definitive profile, it appears that popular discontent is consumerist, concerned about excessive cost and inadequate access; what is wanted is a system that is user-friendly for ordinary people.

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<sup>1</sup> Peter D. Hart Research Associates, *A Survey of Attitudes Nationwide Toward Lawyers and the Legal System* (1993) 4-5. Passages in reverse order in original.

<sup>2</sup> See Marc Galanter, "Predators and Parasites: Lawyer-Bashing and Civil Justice," 28 Georgia Law Review 633 (1994).

4. This is not an aspiration that is easy to fulfill. Law has become more voluminous, more technical, more complex, more remote from everyday understandings, and more expensive.<sup>3</sup> Even if specific bits of it could be rendered simple and comprehensible, it is not clear that would be of much help. For there is more law and each element in the system exists in potential juxtaposition with a great many others, so that its meaning and effect are not readily contained and controlled. It is not clear that ordinary individuals (or even extraordinary ones) can be expected to navigate that turbulent sea.

5. Yet there are more and more entities that are supplied with the capacity to play the high-stakes legal game: some are individuals who attract major investments of lawyering because they have wealth or their cause holds the promise of high reward. But most are collectivities (organized ones like corporations, governments, unions, associations) or ad hoc ones like groups of injury victims, stockholders acting through lawyer surrogates, etc. The presence of an increasing number of more formidable “players” means that various individual interests are vicariously “represented” in the legal arena, even when fewer individuals find themselves able to participate directly in that arena.

6. Courts (and other tribunals) produce two products: dispositions in the cases before them; and signals that are resources for actors to use in constructing, avoiding and resolving other claims. As it becomes more expensive, fewer (relatively) disputes can run the whole course of possible contest. Most cases settle. This was probably always so, but the portion that settles has been increasing (in the U.S.). Also increasing is the acceptance of the notion that promoting settlements is a central and commendable part of the judicial role. It remains unproven that such judicial participation either brings about more settlements or improves the quality of the settlements that do occur.<sup>4</sup>

But as more cases settle, it means that in a large and increasing number of instances it is the signalling function of the courts rather than the direct decisional function that is dispositive. But how these signals are used and combined is largely out of the control of the upper courts and legislatures. For the increase in settlement, which often involves some participation by the court,

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<sup>3</sup> These trends in the United States, Canada, and Great Britain are examined in Marc Galanter, “Law Abounding: Legalisation Around the North Atlantic,” 55 *Modern Law Review* 1 (1992).

<sup>4</sup> The evidence about the effects of judicial settlement efforts is reviewed in Marc Galanter and Mia Cahill, “Most Cases Settle: Judicial Promotion and Regulation of Settlements,” 46 *Stanford Law Review* 1339 (1994).



cuts off the possibility of appeal and effectuates a massive de facto delegation of power to the trial courts (and the legal community).<sup>5</sup>

7. The signals that influence disputing consist not only of the rules established by legislatures and courts, but information about all the costs, delays, and risks connected with pursuing (or defending) a claim. Are the information systems that convey this information (for example, about jury verdicts) adequate? We know little about how legal actors form their perceptions of the patterns of legal activity. It is possible that lawyers and judges themselves, as well as sections of the public, have distorted readings of the legal landscape.<sup>6</sup> Is this something that we should be concerned about? Is there anything that can be done about it?

8. In their enthusiasm for settlement, U.S. courts have inclined to collaborate with parties in keeping information about settlements confidential. Many judges are so captivated by the allure of settlement that they have even been willing to destroy or alter precedent in adjudicated cases for the sake of a subsequent settlement by the parties.<sup>7</sup> These practices raise a whole series of issues about preserving public access to the information generated by judicial activity. Once public force is invoked, should the parties be able to treat information about its effects as their private property? If that information is a public good, should courts refuse to issue protective orders and to enforce agreements about the confidentiality of settlements?

9. In addition to this kind of information about specific instances of the invocation of judicial power, there is information about the patterns and trends of its use. In the U.S. at least, such information is surprisingly spotty in

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<sup>5</sup> Stephen C. Yeazell, "The Misunderstood Consequences of Modern Civil Process," 1994 Wisconsin Law Review 631.

<sup>6</sup> For example, a survey of how the working of tort law was perceived by three elite groups in South Carolina (doctors, lawyers, and legislators) found that all of them overestimated the incidence of litigation, the percentage of cases that went to jury trial, the proportion of jury trials that were won by plaintiffs, and the size of damage awards. Donald R. Songer, "Tort Reform in South Carolina: the Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts," 39 South Carolina Law Review 585 (1988). These perceptions proved largely impervious to the arrival of accurate information. Generally, on the misreading of patterns of jury behavior, see Marc Galanter, "The Regulatory Function of the Civil Jury" in Robert E. Litan, ed., *Verdict: Assessing the Civil Jury System* (Washington: The Brookings Institution, 1993).

<sup>7</sup> For a description and critique of these practices, see Jill E. Fisch, "Rewriting History: The Propriety of Eradicating Prior Decisional Law through Settlement and Vacatur," 76 Cornell Law Review 589 (1991); Michael W. Loudenslager, "Erasing the Law: The Implications of Settlements Conditioned Upon Vacatur or Reversal of Judgments," 50 Washington and Lee Law Review 1229 (1993).

connection with the civil justice system. In contrast with the criminal process, there is no program for systematic cumulative collection, analysis and publication of the most basic data about the court system or other aspects of the legal process. A group of scholars have met to explore the development of useful and feasible indicators of legal activity.<sup>8</sup> There have been some discussions with the U.S. Department of Justice, but so far little progress has been made. One interesting development, that suggests some of the possibilities of harnessing new communications technologies to the development of a continuous and cumulative body of data about the functioning of the civil justice system, is the federally-funded Trial Court Information Network which collects data on-line from some dozens of courts in urban areas that have agreed to provide information in a standard format.

10. In addition to the patterns of legal activity, it is important to know about the perceptions of this activity and the expectations of the system held by various sections of the public. Although most people have only incomplete and vague ideas of what goes on in the legal system, their expectations are influential. The rules that guide the system at any given moment are the product of legislators and judges, but this does not mean that the agenda of legal problems and rights is formed (or even anticipated) by these law makers. They respond to the legal imagination of the populace— e.g., palimony was not simply invented or imposed by the California Supreme Court. Legislators and judges work within the broad currents of changing perceptions and expectations about who is entitled to what. As the population becomes more diverse, more educated and older, demands on law can be expected to change.

11. New kinds of disputes will arise. Disputes, as the working paper recognizes, are not bads to be eliminated—but an important product of the system. As the law addresses new demands for justice it does not, paradoxically, reduce the amount of injustice that it must address. For our society produces new injustices at an ever increasing rate. Injustice is something bad that someone ought to do something about. As the risks of everyday life have declined dramatically, there is a widespread sense that science, technology and government can produce solutions for many of the remaining (and newly revealed) problems.<sup>9</sup> As more things are capable of being done by human institutions, the line between what is seen as unavoidable misfortune and what is seen as imposed injustice shifts. The realm of injustice is enlarged: hurricanes are misfortunes, but inadequate

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<sup>8</sup> These efforts, and the background of the problem, are described in Marc Galanter, Bryant Garth, Deborah Hensler and Francis K. Zemans, "How to Improve Civil Justice Quality," 77(4) *Judicature* 1 (1994).

<sup>9</sup> See Lawrence Friedman, *Total Justice* (New York: Russell Sage Foundation, 1985)

warning, insufficient preparation, and bungled relief efforts may be injustices.<sup>10</sup> Once having an incurable disease was a misfortune; now a perception of treatment withheld or insufficient vigor in pursuing a cure can give rise to a claim of injustice. As the scope of possible interventions broadens, more and more terrible things become defined by the incidence of potential intervention. Consciousness of injustice increases, not because the world is a worse place, but because it is in important ways a better, more just place.

12. Thus every addition to the human capacity for control and remedy enlarges the legal world. As resources increase and expectations rise, new vistas of injustice unfold and new demands for remedy will be brought to the legal system. The legal response to this moving frontier is not necessarily to be viewed as a shift from a corrective to a redistributive agenda.<sup>11</sup> The law of torts, for example, is not redistributive from the *ex ante* (i.e., pre-injury) position, but only from the *ex post* position. What changes are the expectations of the “whole” that is being protected and from what risks. When the frontier of perceived injustice shifts, what might have been a claim for redistribution becomes a claim for corrective remedy. For what is “corrective” depends on the profile of legitimate expectations—and these are changing not because legislators or judges decree it, but in response to wider social currents.

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<sup>10</sup> Cf. Judith Shklar, *The Faces of Injustice* (Cambridge: Harvard University Press, 1990)

<sup>11</sup> Cf. Prospects for Civil Justice, *supra*, pp. 39-40 .





THE MARKET FOR COURT REFORM: A COMMENT  
ON PROFESSOR MACDONALD’S PAPER AND  
COURT REFORM IN ONTARIO

Bryant Garth\*

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I. INTRODUCTION

I have some trepidation about my point of entry into this discussion. The first reason is that Professor Macdonald’s paper covers so many literatures and points of view that it is difficult to find a place to “take it on.” It is a very nice grand tour of the issues infused with both a faith in reform and a critique of potential reforms. The second reason for trepidation is that the other participants in this meeting command some of the discourses that might be available to advance the discussion. In different settings, I might be comfortable either asserting a set of “legal values”—equal access, accountability, transparency—from which we might derive a normative view of some relevance to Canadian courts, or shifting to a discussion of “what we know and don’t know”—and should know—about the actual operation of civil justice systems as a basis to

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ground the debates in more of a social science framework. In the context of this meeting, however, I think others can contribute much more to the development of these perspectives.

I shall take some of the hints in Professor Macdonald's paper to suggest the importance of an examination of the role and position of the legal profession in the market for court reform. The only major disagreement that I must express is with Professor Macdonald's suggestion that "something new" in the current criticisms of the courts is that "professional participants share the ambivalence of the general public" (p. 5). Without a great deal of familiarity with the Canadian scene, my knowledge of professions elsewhere suggests that the precise mandate of this Civil Justice Review—to examine the problems of cost and delay—has been central to the organization and work of the legal profession since even before there were bar associations and law societies. It is not a new professional concern. Indeed, it is a concern built into the structure of a profession necessarily concerned with "justice and the appearance of justice".<sup>1</sup>

A key insight of the paper even if, at times, knowingly disregarded in the interests of policy recommendations (e.g., Appendix V)—is that there are real problems with trying to develop "a functional point of view" that can resolve the question of "the most appropriate mechanisms for the resolution of the various kinds of civil disputes" (Appendix II). The paper thus states at one point that there is "no self-evident policy prescription"—it is a "question of perspective" (p. 10, p. 89, Appendix IV, Appendix V introduction). Elsewhere the author states that, no matter what the analysis suggests, "the political process will ensure that certain matters will remain within the resort to the courts" (p. 65). Indeed, the paper goes further, suggesting that the current landscape of dispute resolution "is the result of political struggles, economic forces, ideology, experimentation by trial and error, institutional resistance to change, ad hoc compromise, self-interest, the novel use of ancient procedures, and simple lethargy" (p. 67). I agree with this aspect of the focus of the paper and therefore suggest that, not only is it important to understand the role of the profession, but also the larger political and economic context.

The academic role in examining questions of reform is generally to make the best possible recommendations on the basis of good legal analysis and good empirical data. I do not disagree. My suggestion in this comment is not meant to imply that good analyses and good data have no impact on the outcome of current debates; but it is difficult to find empirical support or objective functional justifications for many of the most important propositions.

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<sup>1</sup> See, e.g., Garth, "From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values," 59 *Brooklyn Law Review* 931 (1993).



This problem is easy to see, but it may still be helpful to enumerate some of the key propositions in the Macdonald paper developed as the basis for reform.

1. “[C]ourts are no longer seen as adjudicators of private disputes.” As “mini-political arbiters” (p. 50), courts represent a kind of “surrogate political process”. Accordingly, it is important to keep “high profile ‘rights’ litigation” in the courts (p. 68). Of course, part of the profile comes from being in court. We may agree with this approach, but it is not easy to defend as a “given.” It is quite possible, as we have seen in the U.S., to dump much of the civil rights litigation to either private arbitration or to para-judges (termed a “political agenda” (p. 27-28) in the paper). The principle that “whenever the balance of social power lies heavily against a physical person, the mechanism adopted should be designed, at least in part, to rebalance that disparity of social power” (Appendix V), is equally controversial.

2. “As a general principle, the Ontario Court (General Division) should not have jurisdiction in all cases whether (sic) the parties to a dispute are two corporations or partnerships” or “in any matter relating to corporate governance” (Appendix V) (see pp. 75-77). Again, it is obvious that this principle, however admirable, is difficult to establish.

3. More tentatively, the author suggests a variety of possibilities for making “private justice” accountable to the public in some circumstances. For example, “The legislature might well decide that a general statute analogous to the *Judicial Review Procedure Act* should be enacted so as to permit decisions of private decisionmakers to be reviewed by the courts” (p. 83). In fact, there are many models of private justice, as the paper recognizes, and the role of courts in policing private justice is far from agreed upon.

From a U.S. perspective, moreover, these positions today seem “anachronistic.” In some historical contexts they would have seemed preposterous. At other times and places, they might have been accepted almost without question. Part of the problem is that the courts have played very different roles at different times and in different places.<sup>2</sup>

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<sup>2</sup> For example, the courts and the legal profession, after some initial difficulties, managed to become full partners in the New Deal in the United States; yet they had very little to do with the welfare state in the United Kingdom. B. Abel-Smith & R. Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System, 1790-1965* (1967). And it is clear that the role of the courts is changing now, although it may be too early to predict the results. See, e.g., Resnik, “Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century,” 41 U.C.L.A. Law Review 1471 (1994).

The question, then, is whether we should try to look systematically at the larger landscape. My suggestion in this comment is that, ideally, we would have good data also on the larger landscape and the forces that comprise it. That is to say, we would benefit from better “sociological data” on the context for reform and our roles in it. I do not, however, expect that this kind of intensive sociological research will be possible in the context of this reform process in the short term; but it would be useful to encourage that funding be available for studies that are not only designed to encourage reform, but also studies that are “about” the politics of reform. In any event, I hope to encourage some critical thought that may even be useful in the short term.

## II. A SOCIOLOGICAL APPROACH

This kind of sociology has some potential drawbacks. The most obvious is political. It tends to open up to social study processes that generally are left hidden, including the role of the potential reformers and experts—armed with particular social positions and expertises—who happen to be involved in the processes. A sociological explanation of change also runs the risk of making it seem as if whatever occurred was somehow an inevitable result of a certain array of social, economic, and political forces. The purpose of this approach, however, is precisely the opposite. In the context of the setting for the Ontario Civil Justice Review, for example, my claim is that the “space” for reform would be enlarged by a better understanding of what might otherwise be seen as the “social determinants” of reform. That is to say, there is much to be gained by trying to make explicit and subject to analysis what is undoubtedly already in the minds of some of those involved in the Review. Some reforms are “in the ballpark”; others are understood by the participants to be “out of bounds.” And those understandings reflect some assessment of the sociology of the reform process.

On the basis of other work, I will sketch a preliminary theoretical model of the reform process.<sup>3</sup> On the basis of that model, I will attempt to specify some of the factors that might be relevant to further inquiry and analysis. I will no doubt make a number of erroneous statements about the Ontario situation, but my hope is that, in the same spirit as Professor Macdonald’s paper, I will provoke some further discussion.

First, comparative study suggests that we can point to some similarities in the roles of courts in different places and times. But the role is both more flexible than we generally imagine and more tied to the interests and role of the

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<sup>3</sup> The approach is explained and exemplified in Y. Dezalay & B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of an International Legal Order* (forthcoming).

legal profession. Courts tend to embody the legitimacy of the “rule of law.” Depending on the place and time, certain economic and political relations may or may not be under the general jurisdiction of the “rule of law.” There can be a “rule of business” deciding business conflicts privately (there need not be the “shadow of law” that we take for granted in the U.S.) or the rule of the military, or the rule of economic analysis, etc. One of the matters that determines the domain of law or the courts is the place and power of the legal profession.

The only way to understand the different roles and potential roles of courts, therefore, is to study very carefully how a particular legal system and legal profession relates to government and economy in particular settings.<sup>4</sup> One entry into this inquiry is to examine how relations internal to the legal profession shape the discussion of court reform. Court reform can be seen as a site of competition in the legal profession. Different actors in the legal field take positions in the perpetual debates about reform and the role of the courts depending on who they are and where they are situated in relation to other competitors.<sup>5</sup> The changes that take place can be seen as the product of this competition, which is at the same time internal to the profession and responsive to power outside of the legal field.<sup>6</sup>

Among the reasons for changes in positions and in the relative strengths of positions over time are both internal events within the profession and external events in politics and the economy.<sup>7</sup> It is often the case, in fact, that some

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<sup>4</sup> An excellent such study of the United States is Shamir, “Formal and Substantive Rationality in American Law: A Weberian Perspective,” 2 *Sociological and Legal Studies* 45 (1993).

<sup>5</sup> This is not a question only of interest group politics. The competition is not merely about material rewards, nor would many of the participants see the battles in terms of material rewards. It is first of all a contest about the hierarchies and status of particular groups—and their visions of the courts.

<sup>6</sup> The positions in the debates about the role of courts are not necessarily stable. For example, in the debates about the respective roles of administrative agencies (armed with technical expertise) and courts in the period after the New Deal in the United States, the leading New Deal lawyers initially took the position that the courts should defer completely to the expertise of the administrative agencies. They were opposed by most of the legal profession, who feared both that they would be left out of the New Deal and that administrative agencies that were not under the control of the courts would undermine the rule of law. Later, after many New Deal lawyers had become federal judges, others had become Washington lawyers modelled on Wall Street, and the administrative agencies seemed to have gained a relatively greater amount of power, many of those who once opposed judicial review, including Justice Frankfurter and Professor Louis Jaffe, changed their position. See M. Horwitz, *The Transformation of American Law, 1870-1960* (1992).

<sup>7</sup> It should be recognized that “external” events such as changes in politics and the economy themselves occur in certain ways because of the role of law—which varies from place to place—in constituting politics and the economy.



external occurrences *reflected* in the internal dynamics of the profession set the stage for placing a new wave of reform on the agenda and help to give power to particular professional players. These developments can reshape the balance of power within the profession and the position of law in relation to economy and government.

Finally, what is especially interesting is that competition about court reform is expressed by the participants from the legal field in terms of “universals” accepted generally by lawyers, including the ideal of the rule of law. Even a very “political” agenda cannot be expressed legitimately outside of a discourse acceptable to promote some more or less general “role of the courts.” Yet the power of the different positions in these debates depends crucially on who brings what to which position. A full sociological treatment would seek to uncover the links between the debates about what is necessary to maintain the legitimacy of the courts, the characteristics of the participants in the debates, and events in politics and economics that contribute to the reform dynamic. In lieu of such an analysis, it may be useful to ask some questions about the current reform effort.

### III. THE ONTARIO CIVIL JUSTICE REVIEW

The following questions represent my attempt to inspire some sociological consideration of the civil justice reform process in Ontario.

#### (a) INTERNATIONALIZATION OF ECONOMIES AND LEGAL PRACTICES

It may be useful to think about the impact of internationalization on the reform of Ontario civil justice. We can divide internationalization into two aspects: the internationalization of economies and the internationalization of legal practices. Obviously the most important manifestation of these developments is the growth of North American free trade—institutionalized through NAFTA.

NAFTA reinforces the notion that we have one market for North America. We might ask whether there is also potentially (or already in existence) one market in legal services, and maybe even one market in dispute resolution providers. Legal services and courts traditionally have been essentially national monopolies. There could not be one market as long as activities were primarily national. National courts had a privileged position for national disputes, and there were also potential national alternatives, such as arbitration under the auspices of the American Arbitration Association. Will multinational or transnational competition open up the market and make space for a new set of providers in Canada? What would it mean for the courts?

We can speculate on how some of these developments might affect the issues before the Ontario Civil Justice Review. One way is that the competition for the business of handling business disputes could make it very difficult for Ontario courts to “oversee” private justice. The perceived need to attract business to centers of international commercial arbitration, for example, has led many countries, including Great Britain, to transform the relationship between private justice and the courts. The courts are forced to retreat in the name of “party autonomy.” If parties in international business relations can opt for private arbitration outside of Ontario, as they certainly can, there are bound to be market pressures on Ontario to offer the same services—insulated from court review—that are offered elsewhere.

Furthermore, the opening up of the market in private justice and private dispute resolution transforms the market in the reform of civil justice. New providers of mediation, for example, quite naturally enter into the debates about civil justice reform, promoting their taxonomies of dispute resolution processes and the importance of the particular approaches and products that they can offer. We can expect new providers, in addition, to come from multinational affiliations in two senses. Providers from the U.S. can use their market power there as a base to export their techniques and their ideologies into Ontario. And businesses or others who have employed legal or dispute resolution services in the U.S. or elsewhere in conjunction with foreign investments or relations with foreign parties may develop a familiarity and a demand for particular products and producers.

Internationalization as it is proceeding in law and economy has other significant implications. NAFTA quite obviously will provide one new and different type of dispute resolution machinery, which will handle certain kinds of disputes. Business competition can easily lead to trade disputes, and the “laws” and practices of NAFTA panels will certainly be important. More subtle is the impact of NAFTA—and also GATT—on the regulatory activities of the state, which will affect courts to the extent regulatory activity has been policed by the courts. Put more strongly, if we wish to insist that one of the major roles of the courts is to be involved with the enforcement of state regulation of business—environmental, consumer, and other areas,—this role might be undermined by the legal structure of NAFTA—in turn policed by the specific dispute resolution machinery of NAFTA, not by the courts. NAFTA, as is said often about Mexico, is designed to maintain a particular form of neo-liberal state that puts state regulation of the economy somewhat on the defensive.

## **(b) MAPPING THE PLAYERS IN CIVIL JUSTICE REFORM**

Internationalism, as noted above, helps break down the existing patterns of legal practice and dispute resolution, opening up new possibilities and the possibility of new coalitions and approaches. Consistent with neo-liberalism and

a more competitive business economy, we also see much more competition in the terrain of law. Much of the competition can be traced into debates that are at the same time about the proper role of the courts and a reflection of the positions of the players in the market. The various components of the legal profession are united in the fact that they (and the state when operating as part of the “rule of law”) agree that courts should be open, accessible, neutral, and legitimate, but various groups have different perspective on what those terms mean for legitimacy in any given time period. And within the different components of the profession we can also see competition and different positions. An analysis of the current positions and competition can reveal the reform possibilities and limitations. In the interests of time, space, and the avoidance of errors, I will only highlight some aspects of potential approaches of the players in the debates.

1. *The positions within the judiciary.* What are the positions of the judiciary in relation to court reform, and how do they relate to each other? We might expect to find a portion of the judiciary insisting on the role of the courts in protecting civil rights and individuals with complaints against organizations; we might also see judges concerned with “too many cases” (especially of the “wrong” type) and the need for case management and ADR as a means to get rid of the less desirable cases; we might expect to find judges who wish to gain or regain large business disputes for court control through special business courts or procedures; and there may be judges eager to contemplate a life as a private judge after retirement.

2. *The rise of in-house counsel.* A new feature of U.S. civil justice debate is the role of in-house counsel in leading the charge for alternative dispute resolution and private judging, court reform that cuts litigation costs for business, and perhaps also special courts for business. Are in-house counsel also flexing their new muscles in Ontario?

3. *New providers and their allies in the academy, the judiciary, and practice.* As noted before, there are many new entrepreneurial producers of dispute resolution services. They tend to combine marketing efforts and a kind of missionary idealism.

4. *The role of the state.* As with respect to the others in this list, the state is not homogeneous. As the definition of the state changes in response to the particular processes of internationalization described above, it would be interesting to chart the positions of the actors who are found in the field of justice reform.

5. *Public interest representatives.* The discussion paper talks very little about standing, class actions, legal services, or other similar concerns. Is that because the proponents of such reforms are not deemed to be part of this particular round of reform. There is much talk of access to justice, but obviously the main subject



is elsewhere if there is not serious consideration of the main cost of access—legal services.

6. *Pure law and legitimacy.* Academics are the most notable of the groups concerned with finding ways to explain developments and reconcile them with legal values. They tend not to have as much power as business and government, however.

7. *Other practicing lawyers, especially litigators.* The relevance of these groups is obvious, especially litigators who, prior to the rise of in-house counsel, could essentially call the shots in court reform.

#### IV. CONCLUSION

The conclusion is only that it may be helpful to consider this larger perspective, even if the “terms of discussion” in working papers on civil justice reform are almost by definition bound to be more “elevated” from politics, economics, and professional interests. It may be better to try to understand the market in court reform than to ignore it. In any event, one clear choice must be considered out of this broader approach to the issues. Should or can Ontario adopt “protectionist” legal policies for courts, lawyers and providers?



## COMMENT ON “PROSPECTS FOR CIVIL JUSTICE”

**Cyril Glasser\***

Professor Macdonald has produced a very comprehensive paper and, rather than engage in a critique of the many points he makes, I would like to offer a number of general observations, concentrating on the question of where the current Inquiry ought to be heading.

The Issues paper is an ambitious attempt to discuss the classification of civil disputes and the means of their resolution so as to provide for the efficient disposal of civil business. Professor Macdonald uses a traditional descriptive terminology which emphasises the importance of minimising cost and delay in the determination of disputes. Since the nineteen sixties these factors, to a great extent, had been subsumed within a wider concept of accessibility, intended to refer to the ability of the mass of the population to obtain effective assistance from resolution mechanisms within a legal framework. This concept has sometimes been limited to notions of subsidized legal representation; sometimes it refers somewhat more broadly to user-friendly institutional arrangements. In more recent time notions of “cost effectiveness” (so-called) have become of paramount importance to government departments and administrations who are responsible for funding.

I would suggest that, in part, a discussion about classification has arisen because of the fragmentation of our perception of what constitutes the civil process and the methodology of disputing. We no longer talk in terms only of courts and tribunals and questions of demarcation between them. Civil decision-making is often not the result of a dispute; issues arising from the use of discretionary and regulatory powers have become huge subjects in themselves. The role of advocacy in the modern world has expanded in many ways. Dispute handling has spilled over into the field of arbitration and the many colored cloth of ADR. Even in the traditional world of courts and judges a splintering process has taken place. We have seen the inexorable rise of public law and specialised jurisdictions. Simple contract disputes, debt actions, personal injury cases and family jurisdiction have now to compete for time with large-scale international commercial litigation and disaster class actions. A common core of procedure has been unable to provide an adequate framework for the hydra thus created.

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The Issues paper does not explicitly explore two other important situations. The first relates to all the issues which arise from the existence of settlement processes in civil society in which bargaining for a gain goes on sometimes, “in the shadow of the law” and by reference to what the parties realise will ensue if their discussions turn into a dispute. If disputes are only the atypical “trouble-cases” which result from such a process, then we may not be correct in according primacy in our considerations to dispute-resolving mechanisms—rather we should be concentrating on advice facilities which will minimise disputes being carried on into Courts and Tribunals. The second is a consequence of the power relationships in modern capitalist societies and the mediatory role played by the courts. The importance of adjudication in the litigation field is giving way to a centrality of a search for information on which claims may be based or settlements achieved. In the common law system this search may be for material which may found a cause of action. It may be obtained during the course of a law suit in order to bolster a case. In Britain the extent of pre-action discovery is slowly being widened, for example, in personal injury, race and sex discrimination cases. In a world of secrets, access to and a trawl through documents held by government departments or drug companies or fraudulent traders has become a fundamental part of the litigation process.

The role of central government is critical to this discussion. It must provide an institutional framework for formal dispute resolution which can be accessed by its citizens; it must establish and maintain a judiciary and a court establishment; it must prescribe procedures for the courts and tribunals; it must fund a legal aid system; and it must oversee a vast array of formal and informal regulatory bodies as well as the activities of the legal profession. The state is no longer “the hinge” or the passive spectator to a dispute between private persons, providing court facilities as an alternative to self-help. It is an active participant in the activity itself as a funding agent and as a provider of resources. It is not simply that the integrity of the system is dependent on the efficient disposal of disputes but that state intervention is required to manage the priorities between competing demands on time and money which are inevitably thrown up by existing case loads. Modern legal systems have been increasingly unable to cope with the budgetary and labour requirements which have been produced by the increase in user demand. Hence the search for diversion from the courts and the cut-backs in legal services provision. The immediate task is reconstructive, that is to manage, reduce or re-assign cases within a system which attempts to maintain cost and delay at levels acceptable to permit the widest form of access to adjudicative procedures. Professor Macdonald’s paper, in truth, is about the allocation of the choices we must make. Within a system in which an expansion of resources is no longer possible, Keynes aphorism that each use of a resource is always at the expense of another use becomes particularly apposite.

The civil process or litigation “crisis” is common to many countries in the western world. The expansion and democratisation of our legal systems have come to a halt with the slow down the rate of growth in our economies. I suspect

that some figures from the British example may not be untypical. During 1987-88 the total amount of legal aid payments was £426m. By 1993-1994 it had risen to £1,020m. of which £350m. was spent on civil proceedings. This figure is expected to rise to £685m by 1996-1997. During the period 1983-1994 the Retail Prices Index rose by an annual rate of 5% while the cost of legal aid rose by 18% annually. By 1992, it had been estimated that solicitors were earning 25% of their gross earnings from non-matrimonial civil cases, a staggering amount of £1,500m. Little wonder that the British Government has moved to drastically reduce eligibility for free or subsidised legal services so that the proportion of households covered fell from 81% in 1979 to 41% by 1993. Other measures have been adopted to contain and reduce the high rate of growth on a year-by-year basis. Over the next three years the budget of the High Court and the Court of Appeal will not rise in real terms. The costs are expected to be now covered in full by the payment of court fees by litigants. The British government is now moving to cash limit expenditure on legal services.

The work of the courts has also been affected in the services which can be offered to private litigants. In Britain the cost of legal services appears to have risen twice as fast as prices over the last twenty years, the result of lawyer enhancement, increasing complexity in the litigation process and the introduction of new technology. Britain has recently instituted two parallel Inquiries into its system—an investigation into civil court procedures under the direction of a House of Lords Judge, Lord Woolf, and a fundamental expenditure review by the Government department involved. Both have attempted to trawl a wide spectrum of views and seem likely to recommend dramatic departures from existing procedures; for example, almost total control by the court of the allocation and preparation of cases, strict timetables, restrictions on recoverable costs and fundholding linked to franchised lawyers' firms in legal aid cases. Questions remain, however, as to the extent to which charges can be made within the context of the existing arrangements. Should the court, for example, go beyond forcing the parties to prepare their cases in a defined way by actively intervening to force them to settle or dispose of their litigation? If so, at what point should such intervention occur? In truth, the parties can always be forced, as a condition of entering the court process to keep to restrictive timetables for preparation. It may be more difficult for the courts to deliver in terms of early hearing dates and the availability of judicial resources.

The private sector is fundamentally affected by these matters. Individual and commercial organisations must pay for legal services and they must fund private arbitral arrangements. Recent British legal history appears to demonstrate that mass markets for legal services, such as in the fields of divorce or personal injuries, have been the forcing-house of procedural and institutional changes affecting commercial cases and the ethics of lawyers. But no system provides for uninhibited access. The ancient Greeks executed those who proposed legislation which did not pass. More modern systems have indemnity and payment-in rules which provide barriers to entry or force settlement on terms which may

objectively be regarded as “unfair”. Attempts to ameliorate the hardship of these rules are sometimes met with the argument that they must be Draconian to be effective. Britain is an excellent example of this form of approach. In 1993, 211,000 proceedings were begun in the Queen’s Bench Division of the High Court but only 650 were determined by a Judgment after a trial. In large measure this is due to the operation of the indemnity rule. Delay is another factor influencing litigants. In 1993 the average time between issue of proceedings and disposal in the English High Court was 177 weeks. The English approach to forcing attrition in disputed civil cases was well summed up by a legal aid Inquiry in the 1920s which concluded that while it was in the interests of the state that its citizens should remain healthy, it was not in its interest that they should be litigious.

I now turn to the policy which I believe should underlie state consideration of this subject. There are two factors to be emphasised. The first is that regard has to be had to a finite amount of money and resources available, whether they are in the private or public sectors. The second is to reiterate that we are concerned with political decision making and the method by which choices are selected. It is not merely a question of finding temporary procedural solutions to current crises. We have also to be concerned with the management of change and the process of debate and research about the issues involved on an on-going basis.

My first preference, therefore, is for the establishment of on-going institutional arrangements to oversee strategy and the co-ordination of the civil process. They need not constitute a single agency. Such arrangements would be responsible for producing an integrated medium-term financial strategy for the expenditure of public funds in the field which would be open for wide public discussions. They would assign priorities between expenditure on civil courts and tribunals and payments for legal aid. They would be supplemented by an independent research programme. They would plan for diversion of civil business away from the courts where necessary.

My second preference is to an attempt to allocate judicial resources on a consistent basis. We may be moving towards systems where we distinguish sharply between the maintenance of a central court system, concerned with litigation involving a “public interest” element and arbitral systems, with minimum state funding and involvement, concerned largely with “private” disputes. Such an arbitral system might consist of a bundle of ADR methods and be funded by private insurance or in some other way. The allocation of judge power by way of a resources scheme would be an essential part of any such system.

My third preference is for the formal adjudicative process to offer a choice, not just of remedies but of methods of disputing. Such a choice requires procedural innovation. The current situation is the result of monopoly



arrangements. Why should litigants not be free to choose, sometimes with help or direction, the type of decision making which they require and to pay for it accordingly? An appropriate process may allow legal representation or bar it. It might include swift adjudication on paper only or call for a particular type of judge. It might provide for structured settlement or diversion to other forms of resolution outside the courts. The provision of a legal supermarket would encourage choice and help restrain cost and delay.

My fourth preference is for variety in procedures. We need to examine cases on a “type” basis in order to devise appropriate procedures for settlement and resolution. Such an examination would enable us to devise the appropriate procedural “hurdles” to access and in-court settlement arrangements. These procedures would plan for common-form time limits for step-taking and the fair exchange of information at each stage of the process. They would also provide for the extent of judicial interventionism during the progress of the dispute itself. The “common core” procedural systems which are a feature of many court arrangements need to be abandoned for tailored rules.

My final preference is for a more careful and interconnected approach to advice and representation services of all kinds, and not simply those provided by the legal profession. The role of non-lawyers in the disputing process is often under-valued and we need to demystify civil procedures, certainly with the assistance of new technology. I do not see how a discussion of methods of allocating civil disputes can be divorced, either financially or organisationally, from this subject.



## COMMENT ON PROSPECTS FOR CIVIL JUSTICE

Deborah R. Hensler\*

Because Professor Macdonald's review is so very thoughtful and comprehensive, I feel that much of what I might have contributed to your review has already been brought to your attention. My comments then are in the form of ruminations, secondings of Professor Macdonald's views and advice and, in a few instances, some elaboration and addition.

First, and most striking for a student of the U.S. civil justice system, is the incredible similarity between the context of civil justice reform in Ontario and in the States. When I first read the ancillary materials provided concerning the Ontario Civil Justice Review, I was immediately struck by the fact that the Review seemed to be animated by a desire to produce solutions for problems that were largely undefined. Reading Macdonald's paper, I found that in Ontario, as in the U.S., civil justice reform efforts frequently proceed prior to problem definition; rarely confront the difference in values and perspectives of the participants in the policy process and the court system; find little or no empirical basis to support either assertions as to what the problems are or recommendations for solutions, and often pursue policy "fixes" that are poorly understood and not well thought through. I strongly agree with Macdonald's statements that it is difficult - I might even say inappropriate - to recommend policy change in the absence of such empirical and analytic support.

In response to the lack of empirical data in the U.S., Marc Galanter, Bryant Garth, Fran Zemans and I have been pursuing an effort over the past several years to secure institutional support for the establishment of a legal indicators system. I enclose a brief paper<sup>1</sup> I have written on the legal indicator concept, which will be published soon by the University of Southern California Law Center magazine. The Commission might want to recommend a similar effort for Ontario.

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<sup>1</sup> On file with the Ontario Law Reform Commission.



Another response to the empirical data gap—and to the lack of systematic assessments of policy options—would be for the Commission to recommend that any significant changes in civil rules, including the establishment of ADR mechanisms, be undertaken on an experimental basis. In the U.S., researchers at RAND and elsewhere have been quite successful in gaining judicial and lawyer support for randomized experiments with court-administered arbitration programs. Importantly, these experiments have consistently shown—across multiple jurisdictions and for quite varied caseloads—that the results of court-annexed arbitration are almost the reverse of what its supporters and opponents anticipate: Generally, these programs produce little in the way of aggregate time and cost savings. However, in crowded trial courts where most civil cases have no real hope of going to trial, court-annexed arbitration offers a procedural mechanism for granting litigants a “day in court”, which seems to be highly valued by lay litigants in the U.S.

A third component of an empirical research program to support civil justice reform is targeted analysis of particular problems. For example, it appears that “costs” are one of the chief concerns motivating the current Ontario reform effort. In the U.S., we have found that the primary costs of civil litigation are private, not public; moreover, cost levels differ dramatically (but not surprisingly) according to the complexity of the litigation process. Understanding the nature and “drivers” of private litigation costs should be part of the underpinnings of any civil justice reform effort. Another example of targeted analysis would be research on claiming behaviour under different circumstances; I believe Neil Vidmar and his colleagues have conducted some studies like this in Ontario in the past; perhaps they could be used as a model for future work.

Tying these ideas together—the need for a civil legal indicators program, the advisability of experimenting with procedural reforms prior to wholesale adoption and the value of targeted analytic efforts—the Commission might want to recommend the establishment of an ongoing policy research and analysis capability within the Justice system.

Second, I would like to second and underline Macdonald’s call for involving the *users* of the civil justice system in an evaluation of the current system. In my work in the States, I often find that policymakers’ views of what “the public” wants are almost wholly speculative, based on untested “conventional wisdom” about the lay public’s views of litigation and selective encounters with interested parties. As Sally Merry’s work on working-class U.S. citizens’ expectations of the civil justice and my own studies of lay litigants’ claiming behaviour and evaluations of the dispute resolution procedures—among other studies—show, ordinary citizens’ aspirations for and evaluations of the civil justice system are often at variance with the policymakers’ views. In my opinion, civil justice reform efforts too frequently emerge from relatively closed discussion among

lawyers and judges, with little serious effort to engage either the lay public or interested groups of litigants, including business people, consumers, civil rights activities, etc.

Third—and again seconding Macdonald’s advice—I would advise the Commission to reject an undifferentiated view of “dispute resolution”, in which adjudication, including trial, is assumed to be generally inferior to negotiation and mediation processes and, conversely, the latter are assumed to be inherently more efficient and to produce more salutary outcomes. As suggested above, empirical research to date in the States, casts doubt on these assertions. Any recommendations for the expansion of the use of “ADR” should be based on careful consideration of differences between varieties of dispute resolution procedures, their applicability to different types of disputes, and their implications for public outcomes, such as norm generation, as well as private outcomes. I enclose a draft of a paper<sup>2</sup> I presented at the first U.S. National Conference on Mass Torts that addresses these issues in the context of mass personal injury litigation.

Fourth, I echo Macdonald’s call for careful consideration of the issues raised by the use of *private* dispute resolution, particularly court-mandated referral of civil claims to private courts and private judges. With the rapid rise of private dispute resolution in the U.S., there has been increased attention to the public policy implications of private judging. I have served on two task forces of the Society of Professionals in Dispute Resolution that have attempted to grapple with these issues and have produced some tentative recommendations for the courts; I enclose copies of these Task Force reports for your information.<sup>3</sup>

Finally, there is one area of academic research that does not appear to figure in Macdonald’s review which I believe is relevant to your consideration; research on procedural justice. The central question addressed by this body of empirical research is: what factors determine individuals’ views of fair treatment. Examining a wide variety of disputing contexts, including criminal, civil, and bureaucratic, researchers have consistently found that at least in the U.S. assessment of fairness of *process* are as important, if not more important, than whether individuals succeed or lose in gaining a desired outcome. Views of process fairness (“procedural justice”) seem to be grounded in basic notions of what constitutes fair treatment—e.g. being paid attention to, given the same due as others involved in the dispute, being treated in a dignified fashion. Moreover, this research suggests that, at least in some instances of civil litigation, lay litigants are more concerned about these subjective aspects of the dispute

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<sup>2</sup> On file with the Ontario Law Reform Commission.

<sup>3</sup> On file with the Ontario Law Reform Commission.

resolution process than they are about transactions costs and time to disposition. The leading figures in this area of research are Allan Lind (at the American Bar Foundation), Tom Tyler, at U.C. Berkeley, Psychology Department and Robert MacCoun at U.C. Berkeley School of Public Policy.

# CHANNELING CIVIL LITIGATION: A COMMENT ON CIVIL JUSTICE REFORM IN ONTARIO\*

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## I. INTRODUCTION

The Commission's Terms of Reference<sup>1</sup> raise practical and sensible questions about civil litigation expense and delay. None can contest that, if possible to attain, the public deserves "a speedier, more streamlined and more efficient structure which will maximize the utilisation of public resources allocated to civil justice."<sup>2</sup> These concerns and these goals, of course, are shared in the United States where, in many of our jurisdictions, as I shall explain in more detail below, problems of delay and congestion are far more serious than any faced now or even potentially faced in the future in Ontario.

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<sup>1</sup> See Appendix I, in Roderick A. Macdonald, *Prospects for Civil Justice* [hereafter Macdonald Report].

<sup>2</sup> *Id.*, at Appendix I, *supra*, p. 149.



Professor Macdonald's survey of the civil justice system is truly magisterial.<sup>3</sup> His careful and perceptive analysis of the role of civil justice in modern society and the broad set of values implicated by its reach is without recent parallel in Western legal literature. If the Commission's efforts result in nothing more than Professor Macdonald's Report, the project is already a substantial success.

The translation of Report to recommendations,<sup>4</sup> however, may require some further attention. Professor Macdonald admits in Appendix IV that "there is almost no intelligible way to allocate disputes [for purposes of increasing efficiency and reducing delay] among different types of institutions according to their nature, characteristics, or outcomes."<sup>5</sup> Compelled, nonetheless, to do so, Professor Macdonald grudgingly turns to the task in Appendix V. These recommendations, I believe, are problematic and perhaps in some conflict with many of the values he discusses in his broader study.<sup>6</sup> In this comment, I should like to briefly address these recommendations and suggest some of the problems that they raise. In the course of the comment, I shall discuss the underlying approach of the Commission's Terms of Reference and propose a somewhat more modest approach to reform and study of the civil justice system deriving from the results of studies in the U.S. of civil court congestion and delay.

## II. PROFESSOR MACDONALD'S RECOMMENDATIONS RECONSIDERED

The underlying premise of the Commission's Terms of Reference as well as of Professor Macdonald's recommendations is that problems of civil justice cost and delay might be alleviated by the allocation of civil disputes among separate jurisdictional tracks (channels or streams) for resolution. According to this approach, only those disputes regarded as more important or more central to public ambitions with respect to dispute resolution will be retained within the jurisdiction of the Ontario Court (General Division). All other—by definition, subsidiary—disputes will be denied access to the Ontario Court (General Division) and relegated either to entirely private processes or to public courts whose jurisdiction is defined, perhaps, according to specialization (such as courts

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<sup>3</sup> See *n.* 1, *supra*.

<sup>4</sup> R.A. Macdonald, *Some Proposals for Allocating Civil Disputes* at *id.* Appendix V, *supra*, pp. 165-168.

<sup>5</sup> *Id.*, at Appendix IV, *supra*, p. 161.

<sup>6</sup> It is not evident, of course, that Professor Macdonald's purpose in these recommendations is not to provoke the reader, rather than to defend the proposals as implications of his analysis.

adjudicating solely malpractice or, say, auto cases), according to alternative categories of importance (such as a Small Claims Court defined by amount in dispute), or according to other criteria. The reform exercise, then, is to define the criteria of centrality, whether in terms of subject matter, amount in dispute, character of the parties, or the like.

Professor Macdonald defines only those disputes which he regards as most central: those to be retained within the jurisdiction of the Ontario Court (General Division). His criterion for centrality, in the first instance, is the distinction between disputes involving physical persons and those involving corporations. Corporate disputes are to be denied access to the Ontario Court (General Division), and must arrange for dispute resolution privately. Professor Macdonald also suggests (though he, admittedly, does not fully work out or defend) a broader normative approach toward dispute allocation: “whenever the balance of social power lies heavily against a physical person, the mechanism adopted should be designed, at least in part, to rebalance that disparity of social power.”<sup>7</sup>

Set forth below is a list of the sets of disputes proposed to be retained within the jurisdiction of the Ontario Court (General Division) according to this approach, [marked “In”], or denied access to that Court, [marked “Out”]. Professor Macdonald’s first category relates to the parties to the dispute; the second, to the dispute’s subject matter; the third, to what he calls the structure of the dispute:

<u>In</u>	<u>Out</u>
<b><u>Disputing Parties:</u></b>	
Two physical persons	Two corporations or partnerships
Physical person v. Crown	All issues of corporate governance
Physical person v. Corporation	Corporation v. Physical person (? <sup>8</sup> )
Any non-profit or charity	

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<sup>7</sup> *Id.* at Appendix V, *supra*, p. 166.

<sup>8</sup> By inference, though the recommendation is unclear and not defended.

**Subject Matter:**

Land disputes  
 Torts: personal injury or civil rights  
 Injunction, specific performance  
 or other judicial supervision  
 Will, succession  
 Amount greater than \$25,000

Commercial disputes  
 All other torts  
 Any collections case, including  
 consumer purchase or rent

**Structure:**

Any matter > 50,000 causes of  
 action per year<sup>9</sup>  
 Requires experts re causation  
 or damages  
 Damages only issue

Professor Macdonald's allocation scheme is a worthy first effort, but it raises several issues suggestive of difficulties I regard as endemic to the theory that civil justice cost and delay can be fruitfully addressed through the allocation of disputes among dispute resolution mechanisms.

At the outset, it is not at all evident that Professor Macdonald's allocation of disputes will have any substantial effect on the costs and delay of civil adjudication. It is difficult to believe that the disputes that he would deny access to the Ontario Court (General Division) are the source of substantial civil justice delay. My study of the time workload of the Cook County, Illinois (Chicago) civil courts, for example, shows that the sum of time consumed by commercial disputes, non-personal injury torts, and collections is a trivial fraction of the total civil justice workload.<sup>10</sup> My study addressed the workload of courts trying cases to juries, that division which, in the U.S., is subject to most extensive delay. But the result is likely to be even more striking in the context of bench trials where, given some knowledge and resulting predictive power with respect to the judge to whom the case is assigned, the rate of settlement of commercial or collection disputes is likely to be substantially greater. Professor Macdonald may have some greater effect on the caseload by excluding cases involving expert witnesses or where the issue only concerns damages though, as discussed below, there are several other concerns raised by barring such litigation from public adjudication.

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<sup>9</sup> Application unclear: Auto? Workers' Comp.? Other?

<sup>10</sup> See generally, Priest, The Role of the Civil Jury in a System of Private Litigation, 1990 *U.Chi. Legal Forum* 161 [hereafter Priest, Role of the Jury].

This concern about the empirical effectiveness of any dispute allocation scheme in terms of reducing cost and delay, however, is in some respects a detail. In my own view, based upon a series of studies of civil trial courts in Chicago, given the great disparity between the number of cases filed and the capacity of courts to try these cases, there is no categorical allocation scheme, however complex, that will have a long-term effect on reducing trial delay. The mathematics of the point are straightforward. Virtually every estimate of the rate of settlement versus litigation—whatever the jurisdiction or subject matter—shows that 90 to 97 percent of claims filed settle out-of-court, leaving only 3 to 10 percent for trial.<sup>11</sup> Given such an overwhelming volume of potential trials, the diversion through allocation of even a substantial number of disputes currently tried to judgment will only lead a different set of disputes to take its place.<sup>12</sup> As a consequence, no plan of mere allocation<sup>13</sup> can have a long-term effect on delay.

The allocation approach of the Commission's Terms of Reference and of Professor Macdonald's recommendations, however, raises broader questions that extend beyond merely effect. Again, it is the underlying premise of the Terms of Reference (and the specific recommendation of Professor Macdonald) that some set of disputes be excluded entirely from public adjudication. While we have many examples of private dispute resolution, including modern arbitration and current settlements out-of-court, there are few modern examples of private dispute resolution in contexts of total denial of recourse to public adjudication. Perhaps the best approximation is dispute resolution in modern day Russia where, despite the nominal existence of a state, civil transactions take place in largely lawless contexts. The consequences of the total denial of access to public adjudication to some substantial sets of disputes, however, may well be severe.

First, absent some recourse to public adjudication, it is difficult to imagine the grounds upon which private disputes can be resolved. Settlements occur out-of-court where the parties come to agree on the range of possible outcomes at trial and where they realize that mutually agreeable terms of settlement are

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<sup>11</sup> For Chicago, see the statistics cited *infra* text, at n. 27.

<sup>12</sup> For an explanation of the not-obvious mechanism leading to this replacement effect, see generally, Priest, Private Litigants and the Court Congestion Problem, 69 *Bost.U.L.Rev.* 527 (1989) [hereafter Priest, Court Congestion].

<sup>13</sup> I put aside, for example, proposals for gutting or eliminating the civil justice system, such as the New Zealand Accident Compensation Plan.



preferable to the consequences of pressing the case to judgment.<sup>14</sup> The metaphor of bargaining or settlement “in the shadow of the law”<sup>15</sup> is wonderfully expressive, but often the concept of the “shadow” is given imprecise meaning. For purposes of the determinants of litigation and settlement, the concept of “the shadow of the law” does not imply simply some backdrop of vague influence or back-alley course of resolution but, more precisely, the replication in settlement of the expected judgment at trial adjusted by expectations of the probability of outcome.<sup>16</sup> The “shadow of the law”, thus, defines the outline for the terms of settlement. Without the shadow of the law, the grounds for settlement disappear or are replaced by some indeterminate relationship based upon power or exigency.

Arbitration in commercial contexts is not generally different. Many parties agree in advance to subject subsequent disputes to arbitration without recourse to the courts. But the *ex ante* decision to accept arbitration could not be sensibly made unless a party possessed some confidence with respect to the outcome of public adjudication, the outcome of arbitration, and the differences between them. If the grounds for decision in arbitration and in public adjudication began to systematically diverge, arbitration clauses would be chosen in contracts or arbitration accepted subsequently, only if its divergent grounds simultaneously benefitted both parties to the transaction, a not-impossible, but unlikely, occurrence in the context of zero-sum disputes. Similarly, if outcomes at arbitration began to become highly variant—perhaps because not guided by outcomes of disputes pressed to judgment in public tribunals—agreements to arbitrate would decline precipitously.

Perhaps part of the attraction of Professor Macdonald’s proposal to relegate all commercial litigation to private resolution stems from the largely contractual basis in commercial disputes and the belief that non-public institutions can readily interpret contracts. Of course, in relation to other areas of law, contract law seems to provide ready grounds for private resolution because it is so well-settled—at least to those who do not read contract opinions on a regular basis. The problem with respect to the elimination of contract adjudication is not really different: As commercial transactions become more complex and as the stakes

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<sup>14</sup> See generally, Priest & Klein, The Selection of Disputes for Litigation, 13 *J. Legal Studies* 1 (1984) [hereafter Priest-Klein, Selection].

<sup>15</sup> Robert Mnookin & Louis Kornhauser, Bargaining in the Shadow of the Law, 88 *Yale L.J.* 950 (1979).

<sup>16</sup> See William Landes, An Economic Analysis of the Courts, 14 *J. Law & Econ.* 61 (1971); Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 *J. Legal Studies* 399 (1972); Priest-Klein, Selection.

in dispute increase, disputes over contractual interpretation will continue to require resolution. In the absence of a system of civil justice allowing for final resolution, private adjudicators will lack guidance and uncertainty will increase.

A second serious concern with the denial of access to public adjudication of some significant set of disputes is the implication of such a policy for my dear friend and colleague Owen M. Fiss's defense of the "expression of public values" through adjudication.<sup>17</sup> is very difficult to defend, with respect to some significant set of disputes, the categorical conclusion that there will never be *any* public value or concern implicated by their resolution or that public values are so minimally affected as to justify total disregard.

Indeed, it is hard even to imagine examples of categories of disputes raising absolutely *no* issue of public importance. Perhaps the least controversial of the set of disputes that Professor Macdonald would banish from the Ontario Court (General Division) are disputes between corporations over issues of commercial law. But simply to provide illustrations from areas in which I have some expertise, to have robbed these commercial fields of the adjudication of technical commercial disputes between corporations would have vastly affected the public in innumerable ways. For example, the U.S. Supreme Court in 1978 announced and set forth upon an entirely new policy toward antitrust law, adopting as dominant the values of promoting competition and maximizing consumer welfare in a dispute involving two corporations contesting the interpretation of a retail franchising contract.<sup>18</sup> Similarly, there has occurred significant litigation in the U.S. between asbestos manufacturers and their insurers over the meaning of terms in insurance contracts such as "bodily injury" and "occurrence", disputes which on the surface appear abstruse, technical and unrelated to the broader public interest.<sup>19</sup> The implications of the outcome of this litigation, however, are enormous, because the outcome determines whether the hundreds and thousands of workers allegedly afflicted with asbestos-related injuries may recover only from the manufacturers, most of which are insolvent, or also from insurers whose deep pockets remain available to provide compensation.

Professor Macdonald's broader embrace within the jurisdiction of the Ontario Court (General Division) of all disputes involving physical persons is itself suggestive of the problem. Surely, it must be conceded that the rights and resources of physical persons are affected by litigation in which that physical

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<sup>17</sup> See generally, Owen M. Fiss, *The Forms of Justice*, 93 *Harv. L.Rev.* 1 (1979); Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073 (1984) [hereafter Fiss, *Against Settlement*].

<sup>18</sup> *Continental T.V., Inc. et al. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

<sup>19</sup> See, e.g., *Keene v. Insurance Company of North America, et al.*, 667 F.2d 1034 (D.C. Circ. 1981).

person may not be a party. Effects of this nature may occur at a lower level: the damages that a claimant recovers through settlement out-of-court are affected by damages that other claimants have recovered in adjudicated disputes.<sup>20</sup> More generally, however, it is difficult to identify any activity of a corporation, though itself not a physical person, that does not affect some set of physical persons, whether consumers or stockholders. If the recommendation of an absolute ban of certain categories of cases is to be seriously considered, I would strongly recommend that the Commission undertake a careful study of appellate litigation of the past few decades that originated in the Ontario Court (General Division) in order to gain a better sense of the sacrifice such a proposal might implicate.

Finally, Professor Macdonald's broader allocation principle—"whenever the balance of social power lies heavily against a physical person, the mechanism adopted should be designed, at least in part, to rebalance that disparity of social power"<sup>21</sup>—is highly problematic and suggests a radical reconfiguration of our civil justice system. I am hesitant to criticize this recommendation at length, given its openly tentative formulation and the lack of a foundation comparable to Professor Macdonald's more general survey. To give a word, however, systems around the world for the resolution of civil disputes, whether adversarial or inquisitorial, to my knowledge, all retain the feature that the dispute resolution mechanism serves as a neutral decisionmaker, applying laws and standards in force impartially as between the parties before it. In the Canadian and U.S. legal systems, in particular, individuals and especially individuals viewed as deprived or deficient in terms of some measure of power are protected through the definition of rights and through legal standards defined, where necessary, to adjust for power relationships.<sup>22</sup> Professor Macdonald's recommendation suggests a different role for dispute resolution mechanisms, to be designed with respect to jurisdiction and procedure, not as a neutral adjudicator, but so to achieve themselves some rebalance of power. Like much of Professor Macdonald's analysis, the proposal is innovative and highly provocative. I am uncertain of its implications for the reduction of cost and delay.

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<sup>20</sup> Professor Macdonald recommends dismissing or relegating to another tribunal cases solely involving damages.

<sup>21</sup> Macdonald Report, Appendix V, *supra*, p. 166.

<sup>22</sup> See, e.g., *Greenman v. Yuba Power Prods., Inc.* 59 Cal.2d 57, 377 P.2d 897 (1963) (adopting standard of strict manufacturer liability to the consumer in product defect cases on grounds of difficulty of consumers proving manufacturer negligence).



### III. A MODEST PROPOSAL FOR STUDY AND REFORM

I believe that it is heroic to imagine that the allocation of disputes among dispute resolution mechanisms on categorical grounds—whether by party, by subject matter, or by other category—will have substantial success in reducing cost and delay. As suggested above, this belief derives from the empirical realities of civil dispute resolution in contexts in which the volume of claims far outpaces the capacity including the potential capacity of any set of dispute resolution mechanisms to process each claim.

This problem, of course, is most acute in the civil courts of major U.S. cities. In Chicago, for example, whose civil courts I have extensively studied, in 1989 the County Courts (comparable to the Ontario Court (General Division)) faced a caseload of 67,000 suits pending with an additional 25,000 suits newly filed each year, generating an average six-year suit-to-trial delay.<sup>23</sup> This extraordinary delay did not derive from neglect; to the contrary, the Illinois courts engaged in dramatic efforts at congestion reform over the preceding three decades, including a doubling and, then again, a tripling of trial judges; a dramatic increase in the minimum dollar jurisdictional limit; and the allocation of a subset of cases to a specialized tribunal for pre-trial screening; among others.<sup>24</sup> The delay problem in the Chicago courts has been exacerbated by the general availability of jury trials,<sup>25</sup> a source of delay greatly reduced in many Canadian provinces and, possibly, in Ontario given the sensible recent recommendation of this Commission.<sup>26</sup> Even if the Ontario courts face a fraction of this magnitude, however, there is little chance that categorical allocation will have much effect since, by definition, allocation out of the General Division is likely to only be adapted for less significant cases.

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<sup>23</sup> See, Priest, *Role of the Jury* at 198. This statistic has proved so embarrassing that the Chief Judge of the Court, Harry G. Comerford, has refused to provide current figures to allow me to update this statistic except after his personal review of the request. Ironically (or, perhaps, characteristically), the delay attendant upon such a review made it impossible for me to obtain these statistics in time for this Conference.

<sup>24</sup> These reforms and their ultimate lack of success is described in Priest, *Court Congestion* at 557-58. Note that the allocation attempted was of medical malpractice disputes, not terribly helpful with respect to the delay problem because of their small annual volume. (The allocation method—to a panel of physician peers for pre-screening) was later held unconstitutional.)

<sup>25</sup> See generally, Priest, *Role of the Jury* at 191-200.

<sup>26</sup> See, Ontario Law Reform Commission, *Consultation Paper on the Use of Jury Trials in Civil Cases* (1994).



These numbers, however, suggest an approach toward study and reform that might affect cost and delay. First, these numbers show the extraordinary, if little-heralded, reliance of the civil justice system on the private settlement of disputes. In the Chicago courts, for example, over the period of study only between 2.36 percent and 4.90 percent of claims filed ever reached trial.<sup>27</sup> Put conversely, given that 95 to 97 percent of claims settled, the caseload of claims proceeding to trial and the consequent suit-to-trial delay could easily have doubled or tripled if only a small fraction of those that settled out-of-court had failed to settle.

Some commentators, including most prominently, my colleague Owen Fiss, have criticized the settlement of civil (and other) litigation on grounds of the loss to the society from the resolution of disputes without expressions or announcements of public values underlying the resolution.<sup>28</sup> There are separable normative arguments of this critique. First, it may well be appropriate to criticize settlements that are coerced in some respect: either through excessive judicial pressure or as a consequence of decisions with respect to dispute resolution that significantly constrain the ability of litigants to obtain a determinative judicial resolution. Some mandatory alternative dispute resolution proposals may be subject to this criticism. Professor Macdonald's apparently mandatory allocation recommendations are surely vulnerable here.

Secondly, one may well criticize what I might call "corrupt" settlements: settlements in disputes that might implicate third parties, in which, say, the defendant, perhaps to avoid collateral effect, or to seal an otherwise public record to increase obstacles to other potential plaintiffs, offers terms of settlement excessive with respect to the case at hand to secure the plaintiff's agreement. There is substantial empirical indication of the prevalence of such practices in particular forms of litigation.<sup>29</sup>

Putting aside coerced or corrupt settlements, however, it is more difficult to criticize settlements in which parties voluntarily agree that, to each party, the terms of settlement are more attractive than proceeding to litigation.<sup>30</sup> Indeed,

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<sup>27</sup> Priest, Court Congestion at Table 1, p. 540.

<sup>28</sup> See generally, Fiss, *Against Settlement*.

<sup>29</sup> See Priest-Klein, Selection at 24-29, 37-44, 52-54 (describing settlement patterns and trial success rates where either defendants or plaintiffs can be expected to have greater stakes in the case than their adversaries).

<sup>30</sup> Professor Fiss, of course, suggests that there are no (or perhaps few) cases in which there are no effects on third parties from the resolution, rather than the settlement, of the case in much the way I have argued, *supra*, that there are no disputes involving corporations in which the position of physical persons is not affected.

again, as the numbers show, the modern civil justice systems of our major cities rely heavily on such settlements to maintain suit-to-trial delays at no higher levels than at present.<sup>31</sup>

I would propose as an avenue for potential reform and, surely, as a subject for worthwhile study, the magnification of these effects. Reforms that serve to facilitate voluntary settlement of civil disputes will reduce costs and increase access to our civil courts. Of course, many forms of alternative dispute resolution available today serve this effect. The objective of the summary trial procedure, for example, is to reduce uncertainty over the outcome by demonstrating to the litigants the relative strengths or weaknesses of selected items of evidence or testimony. Similarly, the principal strategy of a mediator is to research and identify areas of agreement as between the litigants that their own negotiations have not uncovered before. The Commission should recommend reforms or, at the least, the study of reform proposals to improve conditions for voluntary dispute settlement.

Beside these simple propositions, however, our understanding of the process of settlement or, conversely, of the determinants of litigation is quite unformed. There exists an extensive literature describing analytically the determinants of litigation and settlement,<sup>32</sup> but there has been little application of this learning to real cases. It is, of course, highly unlikely that settlement-facilitating procedures will be successful as applied to entire categories of cases, whether by party, case-type, amount in dispute, or the like. This is one important reason why many mandatory alternative dispute resolution experiments in U.S. jurisdictions have had such uneven experience as well as why the categorical recommendations of Professor Macdonald (and others) are likely to be imperfect in application.

Pursuant to this concern, an important advance can be achieved in terms of the compilation of data regarding the resolution of civil disputes. All academicians call for more data and the compilation of more statistics, but the content of most judicial statistics remains weak and generally unhelpful. Typically, a reform in statistical compilation will be claimed if a court begins to record case volume, casetypes, and mere resolution. These data are not generally useful for understanding the litigation process and are surely useless for understanding the determinants of litigation and settlement.

In contrast, I would propose that the Commission recommend that a new procedure be implemented upon the recording of any judgment as well as any settlement, whether through stipulated judgment or motion to dismiss. The

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<sup>31</sup> I have not attempted to estimate the proportions of which modern settlements comprise coerced, corrupt or voluntary agreements. This is a question well deserving of study.

<sup>32</sup> See, as a beginning, sources cited, *supra*, n. 16.

empirical studies that I have undertaken of congestion and caseloads within the Chicago courts, as well as of broader issues such as the determinants of litigation and settlement and the measurement of legal change<sup>33</sup> have all derived, not from official statistics compiled by the courts, but from a private jury-verdict reporting service that provides to subscribing attorneys short descriptions of the salient facts of each dispute and of its resolution. Many of the Rand Corporation's excellent studies of the civil justice system have used identical sources.<sup>34</sup> I have attached a copy of such a report as an appendix to this comment.

As can be seen from the copy, the Cook County Jury Verdict Reporter provides a summary of the claims and evidence presented in the case, the verdict, and various other information concerning the parties, attorneys and experts, including the last settlement offers of the parties prior to verdict. Anyone who has spent even a minute with official judicial statistics can recognize the vastly greater breadth and depth of the Cook County Reporter.

This detailed information about the case is obtained in a very simple way: The reporting service sends a standard questionnaire about the case to both plaintiff's and defendant's attorneys after the verdict is rendered. Over the now-several decades of its existence (it was founded in 1959), the Reporter has attained a reputation and tradition which leads attorneys, on the whole, to respond fairly and honestly on their questionnaires. (Some years ago, I sent students to Chicago to attend the trials to compare their notes to the account in the Reporter and found the Reporter to be more detailed and complete.)

It would constitute a vast achievement for future research if this Commission were to recommend that a similar process be instituted for Ontario civil courts and extended, not only to attorneys whose cases have been tried to judgment, but also to attorneys whose cases have settled out-of-court. Such a questionnaire—which might easily be implemented electronically—would seek the bare details of the case—parties, amount in dispute, outcome—but also ask for a brief summary of the facts of the case, the matters at issue and, if the case proceeded to judgment, the last settlement offers and the opinion of the attorney as to why the case did not settle. Such a questionnaire can be easily designed and, if sufficiently concise, not prove a significant burden to the attorneys themselves. The Cook County Jury Verdict Reporter, of course, summarizes and reconciles the reports of the two opposing attorneys. In Ontario, that task can be left to academics later studying the process.

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<sup>33</sup> Priest, Role of the Jury; Court Congestion; Priest-Klein, Selection, Priest, Measuring Legal Change, 3 *J.L., Econ. & Org.* 197 (1987).

<sup>34</sup> See, e.g., Mark Peterson & G. Priest, The Civil Jury: Trends in Trials and Verdicts, Cook County, Illinois, 1960-1979 (Rand Corp., R-2881-ICJ, 1982). Reprinted 32 *Fed. Ins. Counsel Q.* 361 (1982).

The collection of such information and especially of such information about settled cases—not now available in the U.S.—would substantially improve our understanding of the litigation and settlement process. Though it would not itself reduce cost and delay, it would provide the basis for the study of the determinants of the settlement failures—those cases ultimately litigated to judgment—that generate cost and delay in our civil justice system. It would be a simple, yet enduring, legacy of this Commission.





THE POLITICS OF CIVIL JUSTICE REFORM  
IN ONTARIO

Peter H. Russell\*

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1. MACDONALD’S GENERAL APPROACH

Macdonald’s paper does not offer any overall panacea—no grand recipe—for improving civil justice in Ontario. While he encourages scepticism concerning the advantages uniquely attributed to adjudication by the courts, he cautions reformers to be wary of the unintended consequences of steering disputes into alternative channels. As I read him, he favours moving intuitively and experimentally towards a more flexible set of arrangements for settling civil disputes. This cautious, experimental approach is to be facilitated by a greatly improved information base on how the whole panorama of publicly significant non-criminal disputes is being handled, and a lot more caution up front in the legislative process about taking public, legal cognizance of relationships in civil society. While there are a lot of nice little theoretical nits I could pick with what Macdonald has to say on this or that point, on the whole I find myself in agreement with his general approach. I want to focus my remarks on the politics of doing civil law reform in Ontario.

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## 2. THE NEED FOR LEADERSHIP AND A POLITICAL AGENDA

The Ontario Civil Justice Review appears to be based on the assumption that the time has come for a systematic attack on delays and inefficiencies in the existing system. Let us accept that assumption, and assume further that the Review comes up with some short-term and long-term recommendations for such a systematic reform process. The question I then ask is—on what political conditions will implementation of these recommendations depend?

My first answer is that a necessary, but by no means sufficient condition, will be the support of a knowledgeable, influential and enthusiastic Attorney General for Ontario. Without an AG who is strongly behind the Review's recommendations and is an able and credible public communicator of the logic and merits of these recommendations, the Review will be essentially of academic importance. Now in my own view that would not be too bad, for, like most academics, I have a lot of faith in the long-term, trickle-down, effect of good scholarly analysis. But I assume that the sponsors of this review want a little more immediate bang for their bucks.

Though there is not much anyone associated with the Review can do to ensure that a terrific AG is in place to implement its recommendations, consideration can be given to the kind of approach and recommendations that are most likely to be taken up by a government responsive to today's political climate.

There are two characteristics which a civil justice reform package should have if it is to be attractive to a reform-minded AG and reasonably saleable to his or her Cabinet colleagues. The first is that at the very least it not cost much money—and preferably that it can be advertised as potentially leading to a reduction of public and private spending on dispute resolution. The second is that it identify the worst injustices that result from the existing system and target these as immediate reform priorities. In today's political climate this right-left approach—deficit reduction and focusing public intervention on the most vulnerable—is the recipe most likely to appeal to the policy chefs of whatever party is in power on the next few years.

Macdonald's paper offers a menu with many items that could certainly respond to the first part of this recipe—the cost-cutting part. In particular, I think many citizens and politicians would be attracted to his suggestion that consent be permitted to play a much greater role in the allocation of disputes to particular fora. I share his wariness about a generic statute subjecting non-judicial dispute settlement mechanisms to judicial review, and support his suggestion that a mandatory registry of disputes processed “informally” is apt to be self-contradictory.

While I can see in the paper lots of potential for the economizing, privatizing—right side of the ledger, I do not see much for the social justice left side. Indeed the paper has little to say about who may suffer the most serious injustices under the existing system of civil disputing. The group I hear about the most in the media are lower middle class individuals, “one-shotters”, to use Marc Galanter’s phrase. Members of this group who are unfamiliar with the law and ineligible for legal aid may be involved in only one serious civil dispute in their life time. When this occurs and they find themselves up against stronger adversaries who can afford delay and the best legal advice money can buy, serious injustices are apt to occur. Individuals caught in these circumstances will often simply have to “lump it” because they cannot afford the time and money it will take to litigate. The stronger party, particularly in situations where its own case is recognized as being weak, has little incentive to consent to a less formal, more expeditious but fair system of dispute resolution. If feature articles in the Sunday supplements are to be believed, these situations often result in individuals foregoing attempts to test plausible and substantial claims in real estate, wrongful dismissal, consumer fraud and like disputes.

Admittedly, my evidence about these injustices is journalistic and impressionistic. However, I would like to hear that the Civil Justice Review is attending more systematically to identifying major social injustices resulting from the existing system and possible ways of addressing these.

At the top of my personal agenda in this field for a long time has been Small Claims courts.<sup>1</sup> Macdonald’s paper contains a good section trashing “the amount in dispute” as a fair and rational criterion for allocating disputes to fora. But it has little to say about the consequences of Ontario’s using precisely that criterion for the adjudication of small claims in shadowy tribunals presided over by moon-lighting, part-time judges. One point we do know about this system is that Macdonald’s statement (at the bottom of p. 31) that because we value judgment so much in adjudication “we take so much care in appointing judges” does not apply to the appointment to judges in Ontario’s small claim “courts”.

It would be interesting to know more about the consequences of closing down the Civil Division of the Provincial Court that specialized in the adjudication of small claims? Has an assessment of this change be made? Does any executive or judicial office keep track of this branch of the civil justice system on a province-wide basis? Is there a carefully thought-out process for selecting the best available persons to serve as judges, mediators or referees for disputes involving small claims? I would be most surprised if positive answers can be given to these questions. In the past senior judges and officials in the Attorney General’s Ministry have been largely indifferent to this part of the

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<sup>1</sup> See Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), chapter 10.



system. The fair and expeditious processing of civil disputes involving modest amounts of money though of great importance to persons of modest means is of little interest to the legal profession. There is no money for lawyers in small claims. It is to be hoped that this bias of the bar is not also the bias of the government.

### 3. CULTIVATING LEADERS OF THE BAR AND BENCH

The most powerful constituencies outside of government itself in making policy with respect to the administration of justice—civil and criminal—are those who speak publicly for the legal profession and the judiciary. Even bold and creative Justice Ministers and Attorneys General are unlikely to proceed with reforms if faced with strong and determined opposition from either of these sources. In my experience with court reform these are virtually the only interest groups with real leverage on the policy process.

Perhaps this is what Macdonald has in mind when he remarks towards the end of his study (p. 90) that “the best one can hope for is a policy decision that is not captured by a single constituency among those who have an identifiable interest in the outcome”. That statement warns of the danger of an interest group capturing the policy process in a positive sense to advance its own interests or its own version of the public interest. I would be more concerned with either the bar or bench, separately or together, using their policy clout in a negative sense to veto policy proposals that are in the public interest.

The issue around which an alliance of bench and bar is most likely to be formed and to be successful in blocking reform is any serious measure of de-judicialization. Macdonald rightly stresses the symbolic strength of adjudication by the courts. In our society, the public may not like lawyers very much, but they trust judges a good deal more than politicians and they believe that rights that are taken seriously are those that can be vindicated in the courts. Public opinion can be mobilized against reforms if they are attacked by leaders of the bar as endangering the rule of law by taking power away from the judiciary. Chief Justices and senior judges will do their fighting quietly in private. But resistance by leaders of the bar and bench can be very effective. I watched it stop Attorney General McMurtry on reform of court administration (ironically key members of the senior judiciary in Ontario resisted his plan to give them more power over the administration of the courts) and stop Attorney General Scott in proceeding with Phase II of his plan to merge the trial courts.

If this analysis is correct, then I think it would be wise to soft-pedal de-judicialization and cultivate allies for whatever reform is proposed in the top echelons of the Law Society, the Ontario Branch of the Canadian Bar Association and the federally appointed Ontario judiciary. Macdonald is more optimistic than I am in calling for “a healthy democratic process”. I am not sure

what he means by that phrase. But if he means a public debate on civil justice reform to which all interested parties have roughly equal access, I am sceptical of that being possible. I think it more prudent and realistic to recognize who are the most powerful players in this policy area and be prepared to deal with them.

#### 4. INCREASING JUDICIAL RESPONSIBILITY

Having been less than thoroughly polite about the judiciary, let me now redress the balance a little by putting back on the table one of the leading ideas of the last generation of justice reformers—namely judicial control over court budgets and court administration.

The material I have read on court administration have convinced me that courts are likely to operate more efficiently and be more flexible and imaginative in promoting alternative modes of dispute resolution when judges themselves have pretty well full responsibility for running their own institutions. Now I know for those who believe that judges and lawyers are hopeless administrators this line of thinking is counter-intuitive, and for democratic purists it is downright subversive. Nevertheless, I continue to think that judges care more about adjudication and know more about it and its alternatives than any other professional group. Also, as a liberal democrat I fear the risk to judicial independence posed by the executive's control over the management and allocation of adjudicative resources. I would make the same case for judges controlling courts as I make for professors controlling universities.

A condition of greater judicial control over court administration and court budgets would have to be greater public accountability for court performance. This, in my mind, would be a healthy change—and one that could more readily be insisted upon, particularly at budget time, if judges were fully responsible for the management of their own institutions. Such a structural change might also provide a stronger institutional base for the assembling and analysis of information about civil disputing that Macdonald sees as a pre-condition for a more intelligent approach to Civil Justice Reform.

We learned from American visitors who participated in this symposium that about 90% of ADR in the United States is court related. In the U.S. system where judges have the primary responsibility for the management of the judicial branch it is much easier to mount a coherent and sustained program of information collection and to experiment with civil justice reform than it is under Ontario's system of divided management.

Such a change in court management would increase public awareness of the need for judicial leadership in reforming the justice system. The reality is that under the present system significant reform will not place without strong judicial leadership. I think the public interest and responsible government would be better

served if the primary responsibility for bringing about a more just and expeditious system of settling civil disputes were in the hands of those who can do most to realize that objective—the judiciary. Ironically this means that the best and boldest move for political leadership may be to divest itself of any pretense at control in this field and to increase the capacity of the judiciary to exercise a holistic responsibility for the justice system.<sup>2</sup>

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<sup>2</sup> If the Civil Justice Review were to take this approach it would reverse a recommendation of the Ontario Law Reform Commission's 1973 *Report on Administration of Ontario Courts, Part I* (Recommendation 4, p. 17) in favour of the position taken by Attorney General McMurtry in his 1977 White Paper on court administration.

# THE LITIGANTS' PERSPECTIVE ON CIVIL JUSTICE

Susan S. Silbey\*

Roderick Macdonald has prepared a thorough and detailed framework for understanding and assessing the civil justice system in Canada. That system, as Macdonald appropriately emphasizes, is primarily a reactive rather than proactive system. Like the criminal justice system which is ironically reactive, the civil justice system is purposively so relying on citizens to mobilize the law. Although the dimensions and substantive concerns of the civil justice system are a product of the ways in which legislatures and courts define legal matters—by establishing standing and jurisdiction, and by acknowledging and codifying particular social relations and events as legally cognizable—the legal consciousness, preferences, and structural resources of litigants are also critical variables in the process of defining and shaping the civil justice system.

What are the different understandings and perceptions of law that encourage some people to call a lawyer if their neighbor's dog disturbs their trash, and others to accept, without asking for compensation or other legal redress, the losses and pain that may be caused by defective products, by unsuccessful surgery, or by gender, racial, or age discrimination? Are Canadians actually litigious? How do we assess litigiousness and in contrast to what? Although these are issues central to any serious effort to understand and assess the workings of civil justice, the attention to litigants' experiences and perceptions is often a neglected arena. Much more attention and many more resources are devoted to studying the legal profession, legislatures, and judges as well as the somewhat more technique oriented issues in the organization and management of the courts. Nonetheless, as Macdonald's paper repeatedly asserts, the raw material of civil disputes is created and shaped long before the professional work of definition and management takes place.

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It would be a mistake, however, to assume a linear perspective here; that is, that social cultural factors shape law. For sure, a more interactive conception of the relationship between “law” and “society” is called for. If we regard law as constitutive, something simultaneously producing and produced by social interactions, popular cultural conceptions of law are aspects of the life of the law, neither entirely an independent nor entirely a dependent variable. It is obvious that the formal aspects of law, for example definitions of the family, conceptions of sexuality, criteria of property and title produced within legal doctrine and through legislation contribute to popular understandings and practices. Conversely, popular understandings and consciousness nourish the cultural surround in which law develops and is deployed. Thus, it is important to recognize that doctrinal and institutional aspects are themselves affected by non-legal and popular conceptions and understandings that become embedded within the formal body of law.<sup>1</sup> This reciprocal operation and mutual constitution of popular and professional legal understandings can provide fertile ground for a better understanding of civil justice.

*Cultural Analyses of Law: Theorizing the Litigant's Perspective:* There is a growing body of empirical literature that attempts to describe the popular cultural understandings of law. These studies of legal culture illustrate the constitutive perspective I suggested above. In particular, cultural analyses of law attempt to describe the processes by which law contributes to the articulation of meanings and values in daily life. Attention is directed to the local contests over signification within different and competing discourses which extend to the most mundane areas of life.<sup>2</sup> In these analyses, however, one observes both the orchestration of the local contest and the systematic (structural) outcome. For example Stuart Henry's work *Private Justice* describes this process in work situations, specifically the interaction between industrial discipline and formal state law.<sup>3</sup> In this work, Henry shows how disciplinary policies and practices are shaped both by the structure in which they occur and the semi-autonomous individuals who participate in them and who enact the policies. He describes the ways in which local disciplinary practices are partially shaped by government legislation and case law, as well as government supported arbitration and

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<sup>1</sup> Susan S. Silbey, “Making A Place for Cultural Analyses of Law” *Law and Social Inquiry*, Volume 17, Number 1, pp. 39-48.

<sup>2</sup> See for example, David Engel, “Law, Time and Community” 21 *Law and Society Review* 605 (1987); Carol Greenhouse, *Praying for Justice: Faith, Order and Community in an American Town*. Ithaca: Cornell University Press, 1986; Thomas Kearns and Austin Sarat, *Law in Everyday Life*, Ann Arbor: University of Michigan Press, 1994.

<sup>3</sup> Stuart Henry, *Private Justice*, London: Routledge and Kegan Paul, 1983.

mediation services. But these local disciplinary practices are also produced by specifically distinguishing local policies from state processes. Henry illustrates how the forms of social control, state and local, mutually interact and how they are recreated through discursive practices which “constitute each [form of control] by juxtaposing one with the other”<sup>4</sup>.

For example, Henry provides examples of particular linguistic borrowings from law into local disciplinary processes which point to the similarity between the local administrative apparatus and the state courts but also convey legitimacy to the local form. At the same time, even as local managers contrast and differentiate local processes from state forms, the appropriation of legal concepts and abstractions permeates the discourse. In this way legal abstractions and linguistic formulations, e.g. “witness”, “appeals”, “defence”, “evidence”, are affirmed and reified, even as the formal legal process is resisted. This affirmation and reification nonetheless obscures the agents’ active role in its creation, reproduction, and legitimation. “Although the representations of this disciplinary control are at variance with those of the law or courts, nonetheless the same concepts are the medium for discussing issues of control”<sup>5</sup>. Rather than weakening state control, the local processes invest in them at the very moment they seek distance.

Henry provides concrete historical analysis of how local discursive practices recursively constitute systemic patterns of control and power. Henry also identifies forms of disjuncture and discontinuity. Rather than different forms of organization containing correspondingly different forms of control, as much anthropological literature had for many years argued, Henry concludes that “different kinds of organizational structure accommodate aspects of the whole range of theoretically identifiable forms of private justice”<sup>6</sup>. Thus, he emphasizes the existence of constraint and the possibilities of change. But that change, he suggests, demands attention to the mutuality and integration between local and state forms and understanding of the semi-autonomous agency that creates as well as reproduces those social forms. This work offers lessons for civil justice reform. It suggests that reform must take account of the cultural processes - linguistic and organizational resources and constraints that are too often ignored in reform efforts.

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<sup>4</sup> Stuart Henry, “The Construction and Deconstruction of Social Control: thoughts on the discursive production of state law and private justice” in *Transcarceration: Essays in the Sociology of Social Control*, John Lowman, Robert Menzies, T.S. Palys (eds.) (1987) p. 100.

<sup>5</sup> Henry, 1987, p. 103.

<sup>6</sup> Henry, 1983, p. 220.

Research that tries to document the ways in which institutions are culturally constituted, and the lessons that may be derived from them, depend on a particular theoretical understanding of both social structure and legal values, ideas and consciousness. Here, social structure refers to the constraints operating in situations to channel and limit the play of practice. Structure is not simply *inserted* into situations; it is *constituted* through active social practice. Connell, for example, uses an early 1960's study by Young and Willmott to illustrate this constitutive understanding of social structure. Young and Willmott described a matrifocal kinship structure among residents in Bethnal Green, East London. Although the Bethnal Greeners have no concept of 'atrifocality', and are unlikely to use anthropologists' analytic terminology, "daughters and mothers pop in and out of each others' houses up to twelve times a day; they exchange services like care in sickness, and negotiate about other family relationships—including the daughter's marriage".<sup>7</sup> The Bethnal Greeners create, recreate, acknowledge, and value matrifocal kinship minute by minute, hour by hour. Here, social structure is not abstracted from practice; instead it is created through daily activity.<sup>8</sup> It is enacted and encoded in regular, seemingly uneventful, and routinized experiences. Being present in every situation, however, structure is also vulnerable to major changes of practice. Thus, structure can be shaped and reshaped, enacted and created while past practices nonetheless constrain that daily creation.

Borrowing a provocative illustration from marine biology, Henry offers a succinct statement of this conception of structure, what Neurath describes as the process of rebuilding a boat plank by plank while still keeping afloat, what Anthony Giddens calls structuration, and yet others call co-determination.

"It has been observed by marine biologists, that whale songs have a characteristic form for each school of whales; that if whale songs are recorded on one day and then another, the same school has the same song. However, when biologists return to record that school's song say one year later, the song is completely different. The explanation for this change is that the characteristic song is the result of individual whales hearing and sharing in singing each other's song; each rendition is shaped by the social structure that is the whale song. But at the same time each individual has enough autonomy to add small variations and innovations to the main theme; the continuously produced whale song is a resource and medium through which each individual and unique whale can creatively reproduce the song. This creative interpretation and selection is not enough to completely transform the song, that is and remains the total medium, but it is enough to change the song just a little. Other whales in the school pick up the general

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<sup>7</sup> R.W. Connell, *Gender and Power*, Palo Alto: Stanford University Press, 1987:93,95; citing M. Young and P. Willmott, *Family and Kinship in East London*, London: Harmondsworth: Penguin (1962).

<sup>8</sup> For an extended discussion see Jean Comaroff, *Body of Power: Spirit of Resistance*, Chicago, University of Chicago Press, 1985, Part I; also Timothy Mitchell, "Everyday Metaphors of Power", *Theory and Society*, 1990; Anthony Giddens, *Central Problems in Social Theory* (1979), *The Constitution of Society* (1990).



song, incorporating as it now does, the slight modifications of those whales who have been singing. The result is that after a period of time the micro-contributions of the individual whales transform the very totality of the whale song which has given and continues to give shape and general direction to their individual action.<sup>9</sup>

Cultural analyses also attend, in addition to processes of struggle and reproduction, to the particular substantive values and meanings that are produced and articulated through legal discourse. The term legal consciousness is used in this literature to refer to these values and meanings, specifically the ways people make sense of law and legal institutions, that is, the understandings which give meaning to people's experiences and actions. While Henry described *how* meanings are created, others also describe *what* meanings are created. Just at this research abandons a static and deterministic view of structure, the cultural-constitutive perspective necessitates a similar abandonment of consciousness and hegemony as static disembodied sets of ideas - meanings and values - that are simply absorbed by members of a culture. If hegemony describes the ways in which dominant alliances of social groups exert total social authority over subordinate groups through a non-coercive process of the manufacture of consent among those groups<sup>10</sup>, hegemony is "not universal and 'given' to the continuing rule of a particular class. It has to be won, reproduced, and sustained. Hegemony is, as Gramsci wrote, a 'oving equilibrium' containing relations of forces favorable or unfavorable to this or that tendency"<sup>11</sup>. Thus, cultural-constitutive analyses describe consciousness, like structure, "generated in and changed by social action"<sup>12</sup>, "less a matter of disembodied mental attitude than a broader set of practices and repertoires available for empirical investigation"<sup>13</sup>.

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<sup>9</sup> Stuart Henry, "The Construction and Deconstruction of Social Control: thoughts on the discursive production of state law and private justice" in *Transcarceration: Essays in the Sociology of Social Control*, John Lowman, Robert Menzies, T S. Palys, eds. 1987, p. 98. Henry is paraphrasing and quoting from David Attenborough, *Animal Language*, BBC 1882.

<sup>10</sup> Dick Hebdige, *Subculture: The Meaning of Style*, London and New York: Methuen (1979), p. 16.

<sup>11</sup> S. Hall and T. Jefferson, *Resistance Through Rituals: Youth Subcultures in Post-War Britain*, New York: Holmes and Meier Publishers, 1976:40.

<sup>12</sup> Gordon Marshall, "Some Remarks on the Study of Working Class Consciousness" 12 *Politics and Society* (1983).

<sup>13</sup> Rick Fantasia, *Cultures of Solidarity*, 1988:14; cf. Ann Swidler, "Culture in Action: Symbols and Strategies" 51 *American Sociological Review* 1986; Pierre Bourdieu, "Cultural Reproduction and Social Reproduction" in Jerome Karabel and A.H. Halsey, eds., *Power and Ideology in Education*, New York: Oxford University Press; *Outline of a Theory of Practice*, Cambridge: Cambridge University Press (1977).



But these meanings and values are neither fixed, stable, unitary nor consistent. Thus, for example, the ideas, interpretations, actions and ways of operating that collectively represent a person's legal consciousness may vary across time (to reflect learning and experience) or across interactions (to reflect different objects, relationships or purposes). And, to the extent that consciousness is emergent in social practice and forged in and around situated events and interactions (a dispute with a neighbor, a criminal case, a plumber who seemed to work few hours but charged for many), a person may express, through words or actions, a multi-faceted, contradictory, and variable legal consciousness.

Although consciousness may be, according to this perspective, emergent, complex, and moving, nonetheless, it has shape and pattern. The possible variations in consciousness are limited, i.e. situationally and organizationally circumscribed. Rather than talking about meaning making as an individualized process, cultural analysis emphasizes the *limited* number of available interpretations for assigning meaning to things and events within any situation, or setting. Similarly, access to and experience within the situations from which interpretations emerge is differentially available. Here attention to consciousness emphasizes its collective construction and the constraints operating in any particular setting or community as well as the subject's work in making interpretations and affixing meanings.

For example, in an analysis of the movement to create alternatives to law through a variety of forms of "informal" dispute processing, we described how localized discourses, rooted in the legal profession, social science theorizing, and community organizing, contributed to a general institutional production. Specifically we described how divergent social groupings adopted shared linguistic formulations, definitions of the situation, and proposals for action.<sup>14</sup> Despite what appeared to be competing political values and professional interests, a consensus emerged around a stable image of law and legal processes as cumbersome, slow, inaccessible, and unhelpful, exacerbating social ruptures rather than healing them. Just as Henry noted among industrial disciplinary policies, we observed how the movement to create alternatives to law nonetheless mobilized legal values and images even as it attempted to market alternatives. In addition, we noted the influence of additional professional discourses, including the helping and therapeutic professions. Thus, this work described a successful movement to create a new market of dispute resolution services by adopting and articulating values and images already accepted and legitimated elsewhere. The "new" market - dispute processing and dispute resolution - was thus conceptually enabled and eventually institutionalized by both its borrowings and its distinctions from other institutions. These common articulations, e.g. "dispute",

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<sup>14</sup> Susan S. Silbey and Austin Sarat, "Dispute Processing in Law and Legal Scholarship: From Institutional Critique to a Reconstitution of the Juridical Subject" 66 *Denver Law Review* 437 (1988).

“voluntary”, “hearing”, “complaint”, “resolution”, contribute to the legitimization of an innovation, the source of which is obscured by apparently commonplace, already accepted language and interests. Again, a cultural analysis of a legal reform has pointed to factors that were overlooked or unnoticed by the promoters and participants in the reform effort.

*Fieldwork on Popular Legal Consciousness: What Do Plaintiffs Want Revisited.*<sup>15</sup> Although the theoretical work on legal consciousness has been proliferating, and in direct response to and interaction with empirical studies, the literature has produced a contradictory set of results depending on the methods of research adopted. Thus, any attempt to rely on research on litigant’s consciousness and perceptions of law to direct reform of civil justice will need to attend not only to the theoretical framework but to serious questions of method as well. It seems that large-scale surveys have consistently reported systematically lower levels of legal need and mobilized legal consciousness for racial minorities and lower income populations, and consistently positive perceptions and interpretations of legal experiences across all social groups. Many studies have been unable to capture quantitatively what is visually observable: the differential use of civil courts by racial and ethnic minorities. At the same time, such studies report undifferentiated positive support for legal institutions. In contrast, ethnographic studies with intensive rather than extensive observation and interviewing have reported significant variations in legal needs and consciousness, that is differential perceptions of and experiences with law. Some studies report outright resistance to law.

As a consequence of these contradictions and in response to a request from the New Jersey Supreme Court Task Force on Minority concerns, I designed a research project to overcome the disparities in method and results that plagued the socio-legal literature.<sup>16</sup> As a part of an extensive analysis of racial bias in the courts, the Task Force wanted to know whether there were differences in the voluntary use of law and courts by minority and non-minority citizens which might intersect with other forms of bias within the courts. This was to be a study of legal institutions from the “bottom up”. Could we determine whether there were racially differentiated perceptions and experiences of law and courts among New Jersey residents? As a result of the New Jersey Supreme Court’s request, and additional support from the National Science Foundation, we have spent the last four years collecting stories of law.

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<sup>15</sup> Susan S. Silbey and Sally E. Merry, “What do Plaintiffs Want? Reexamining the Concept of Dispute” (1984), *Justice System Journal* Volume 15.

<sup>16</sup> The research reported here was undertaken in collaboration with Patricia Ewick and funded by the State Justice Institute, and the National Science Foundation grant SES-9123561, SES-9123433.

To generate these stories of law, my research collaborators and I had individual conversations with over four hundred residents of New Jersey, each lasting between two to five hours. We spoke with an ethnically and racially diverse group of men and women randomly selected from four counties; the counties were selected for the variation in their racial and class composition. One county contained the lowest percentage of non-white residents. A second county was included because it contained the highest density of non-white residents, as well as the largest variation in class composition. A third county had the highest hispanic population. The fourth county was selected because of its heterogeneity on all demographic variables. We asked people to talk about their families and communities. We asked the people with whom we spoke what they perceived as disruptions in these: things they wished hadn't been as they were, and then we asked how they acted in these situations. We also asked people to tell us about any experiences they had with formal legal agents. The stories we collected describe the ways in which daily events and relationships come to assume or not to assume a legal character.

"Collecting stories" and "having conversations" is not the usual way of describing social science research. But this is not the usual project of either quantitative or qualitative social science. As I suggested, it is a self-conscious effort to combine both quantitative and qualitative forms of analysis and thus overcome inconsistencies in the existing empirical literature. We designed this project to retain the virtues of the large-scale studies (reach enough people to produce generalizable results), while retaining the capacity of ethnographic studies to access individual interpretations and understandings of variable experiences. As a consequence, the data collection stage of this project took several years as we spoke with a large sample of respondents (433), in open ended, intensive interviews lasting at least two hours, more often three to four hours each.

The quantitative analysis of the data is complete.<sup>17</sup> We found that respondents report a substantial need for law, as measured by the number of potentially legal problems people experienced. The legal need of respondents is measured by their responses to an extended inventory of problems, any one of which could theoretically become the subject of some form of legal intervention. The average number of problems reported was 14, and that number did not vary significantly by race, nor by class nor gender. This is, of course, an important finding because, by showing the number of problems to be the same, it confirms our original assumption and working hypothesis that previous research has systematically underestimated the legal needs of minority populations.

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<sup>17</sup> Susan S. Silbey and Patricia Ewick, *Differential Use of Courts by Minority and Non-Minority Populations in New Jersey*, Trenton, N.J.: New Jersey Judiciary Supreme Court Task Force on Minority Concerns, August 1993.



While there is no significant variation in the *number* of problems, however, there is variation in the frequency with which different racial groups reported having experienced *certain* problem situations: the *type* of need, or the type of problems experienced did vary by race/ethnicity and gender. Moreover, the variation reflected differences in material and social resources deployed by these different groups and the shape of their daily lives. For instance, the legal needs of racial/ethnic minorities concerned discrimination, housing, police harassment and poor police protection. Women were significantly more likely to experience problems related to their traditional gender roles of mothers, wives, and consumers. Women were also more likely than men to report having experienced job related problems such as sexual harassment and unequal wages. These findings suggest the need for greater attention not only to the level of legal need but to the variety of life experiences and the variety in kinds of disputes and problems that emerge out of these experiences.

Perhaps more surprising than the comparability of legal need among the respondents was the comparability of legal use. When individuals were asked how and why they responded as they did to the various situations they described, minority and non-minority respondents alike described a wide repertoire of actions, with law being only one. Respondents did not appear hesitant or unwilling to use the law or other governmental agencies when they identified a need. Of the 4821 actions described to us by respondents, 675 (14%) were instances of citizens "turning to law": calling the police, consulting a lawyer, or contacting a government agency. Again, significantly, the racial/ethnic differences that were hypothesized were not borne out by the data. There was little or no difference in the likelihood that minority and non-minority citizens would turn to law in responding to what they described as problematic situations. Variations that emerged were as great among non-white groups as they were between white and non-white citizens. In the case of court experience, hispanic respondents were significantly less likely than either white or black to report such experience. In one form of legal action, however, there was a significant variation between white and non-white populations. Having been criminally victimized, we found that black respondents were significantly less likely than any of the other groups to call the police to mobilize a legal response.

In addition, we believe that there is an intersection between the type of problem people experience and the form of legal action they take. In other words, many of the problems reported by minority and poorer respondents are routinely handled by administrative agencies and criminal law rather than through civil justice procedures. Thus, we are able to partially explain, only partially however, the observation of lower use of civil law with equally reported levels of legal need.

Against this background of legal need and use, we did find significant racial differences in the perceptions of and attitudes toward the legal system. While



minority respondents were no less likely to see the courts as *effective* in resolving problems and disputes than whites, they were significantly more negative than whites about the *justness and fairness* of the law. Minorities were, in other words, less likely to perceive the courts and the law as conforming to the liberal democratic ideal of equal justice under the law. Despite their heightened criticism of the legal system, minorities did not express any less willingness than whites to use the law and court. As measured in terms of their responses to hypothetical situations and in terms of their self-characterized willingness to use the law, minorities came out, if anything, as *more* willing than white respondents to turn to the law. It appears that while the law may not be perceived as fulfilling the ideal of equal treatment, it may be better than informal, unregulated arenas. When we examined the effect of legal experience on citizen perceptions and attitudes, we found confirmation for this complex pattern. Court experience has a mixed effect on citizen assessment of the law. In respect to issues concerning the everyday relevance of law we found that experience enhanced citizen evaluations generally. At the same time, experience eroded citizen assessments of the *justness and fairness* of law. These results reinforce the findings that citizens generally saw the law as an effective problem solver without necessarily seeing it as fair and responsive to citizen differences as democratic ideals and citizens hope.

Finally, throughout this analysis when we found differences by race, it was often the case that there was as much variation among minority groups as there was between whites and "non-whites." In regard to some issues, black respondents were indistinguishable from white respondents while hispanic respondents constituted a separate category, often distinctive by virtue of their willingness to use the law despite their relative legal inexperience. We concluded from this that too often in social analyses the only important distinction that is drawn and to which policy-makers and scholars attend is the difference between white and non-white. We should be cautious about this tendency. In focusing our attention on that particular divide, we are in danger of overlooking critical and important differences in culture, history, experiences and resources among and within racial groups.

The second half of this project focuses on just those differences in experiences, and interpretations of those experiences, i.e. legal consciousness, by qualitatively analyzing the transcripts of the interviews. The quantitative analysis of the data has produced important results, of immediate value to the judiciary and challenging for social scientists. It has partially confirmed and partially disconfirmed earlier studies. It is important, however, to supplement this data with a systematic analysis of the ways in which the respondents talk about and interpret their experiences. If we are to access and understand the dimensions and varieties of legal consciousness, we must not rest with representations of consciousness several times removed in quantitative data.

We are now engaged in just this kind of in-depth textual analysis of respondents accounts of their experiences of law. Half of the 430 interviews have been transcribed to provide the data for this second half of the project. The interviews contain specifically designed openings in which respondents provide detailed descriptions of events and relationships, both troubling and unproblematic. In response to a variety of probing questions, respondents describe the salient features of their relationships and transactions in a variety of settings and groups (e.g. living in a neighborhood, buying and selling goods, going to the doctor, enrolling a child in school, joining a church), and what values govern these routine transactions that are either disturbed or reconstituted in problem events. The conversational portions of the interviews - which constitute three quarters of the two to five hours of each session and which appear throughout the interviews - provide the data for this part of the analysis of how respondents conceive of themselves in relation to legal institutions.

From the analysis of the transcripts completed thus far, it seems clear that we will not tell one story of law, but many. We will be able to show how people's understandings of law are neither fixed, nor unitary, but instead seem to vary across time and across interactions. Thus far, we have been able to identify at least three different ways of understanding and relating to law: (1) At times, in some situations, people express loyalty and acceptance of legal constructions; they believe in the appropriateness and justice provided through formal legal procedures, although not always in the fairness of the outcomes. In these tellings, respondents conceive of law as something external, relatively fixed and impervious to individual action. In a sense, respondents sometimes tell the law's story of its own awesome grandeur, something that transcends by its history and processes the persons and conflicts of the moment. (2) Some stories, however, describe acceptance of formal legal constructions and procedures for only specified objectives and limited situations. Here the narratives voice less concern about the appropriateness and legitimacy of legal procedures than about their effectiveness for achieving desired goals. These stories describe a world of strategic and voluntary exchanges; they seem less concerned about the law's power than about the power of self or others to successfully deploy law. (3) Many of the stories we hear, however, do not express loyalty, conformity or even instrumental acceptance of the law. Some of the stories describe instances of resistance to law. In these narratives, there is a recognition of law as a terrain of power and an assessment of one's location within it. Finding themselves within the reach of what seems hostile and alien, or merely complex and overwhelming, persons describe situations and actions in which they try to undermine the consequences of the power they encounter.

We should emphasize, however, that most people with whom we have spoken often do not conceive or interpret their lives, events, and circumstances as legally relevant. Similarly while they position themselves, in this sense, outside of law, they also see themselves as acting without law since the law is not seen as informing their self conscious actions and interpretations. In many

situations, they avoid the law, or exit its domain. Sometimes, this avoidance is simply because they do not conceive of their situation in legal terms. But sometimes they refuse to engage law because, they say that they do not want to become the law's, in addition to their adversary's, victim. These are stories of non-engagement. In related stories, persons also avoid legal actions but unlike the previous accounts, these narratives reject legal constructions and interpretations of events neither unconsciously, nor because they reject the law's relevance, nor because they fear its ontological consequences. There is a sense of remoteness which combines a rejection of formal law with an affirmative commitment to other ways of operating, often grounded in local cultures. Despite its apparent location outside of law - practically, discursively, ideologically, - these kinds of stories nonetheless often depend on images of legal alternatives not sought. Importantly, those who tell these stories do portray allegiance or loyalty to a normative order, but this allegiance is rooted in alternative norms and visions of authority.

In describing these stories of law, I should emphasize that one person sometimes tells different kinds of stories. Our analytic task is to keep this diversity and complexity alive yet help make sense of the meanings of law expressed and enacted in the stories. It is important that we not only to describe the variation among people's experiences of law, but also to explain those differences by identifying the social forces and correlates of the varieties of legal consciousness. At present, for example, it appears that the density of social relations (how connected a respondent is to others, how many social relationships the respondent names) is a strong predictor of the variations in legal consciousness. The less well connected, the fewer social relationships, the less likely a respondent is to turn to law as a response to a perceived legal problem.

Also, we believe the data is beginning to reveal that social structural constraints, as we might imagine and much sociological literature has already documented,<sup>18</sup> accounts for variations in legal consciousness. One respondent may express confidence and acceptance not only of legal interpretations of an event or relationship, but also articulates a willingness to engage legal remedies but may nonetheless provide repeated evidence of avoidance of the law. We have begun to see that this variation is often explained by the structural constraints on the mobilization of law that is simultaneously accompanied by a conception of self, when imaginatively freed of those constraints, as a fully endowed and empowered legal subject. For example, in an analysis of a single respondent's experience of law, we were able to document at least three forms of legal consciousness: conformity, contestation, and resistance.<sup>19</sup> These variations were

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<sup>18</sup> Donald Black, *Sociological Justice*. Toronto, Oxford University Press, 1991.

<sup>19</sup> Patricia Ewick and Susan S. Silbey, "Conformity, Contestation and Resistance: an Account of Legal Consciousness" *New England Law Review*, Volume 26, Number 3, p. 731-749.



determined, we argued, by the different roles and relationships the respondent could mobilize in different settings. When alone and without institutional or relationship supports, the Millie Simpson behaved exactly, and untypically, as legal authority expected; she conformed completely with legal orders and expectations. When she could draw upon her role as a churchgoer, an active member of a community of church members, she resisted the law. And when she could vicariously deploy the wealth and status of her employers, she engaged the law in a contest more typical for repeat players in the system. Embedded in Millie Simpson's stories of conformity, contestation and resistance are accounts of her multiple social roles and the institutional structures in which they are enacted. Her legal consciousness were produced interactively with those various roles and institutional locations.

*Adapting Cultural Analyses of Law to a Variety of Types of Legal Actors.* Most of the research on legal consciousness has focused on the individual social actor, or in rarer occasions on social movements and groups. However, few studies have employed similar cultural theories or ethnographic methods to analyze the corporate cultures of litigation. Although we have some excellent studies of major and mass tort litigation, we have few in-depth qualitative studies that examine the consciousness of the corporate and business participants. For example, some years ago Stewart Macaulay documented widespread avoidance of law by automobile dealers. We have had few similar studies recently of how businesses and corporate managers decide to litigate. What are the local organizational and normative constraints, and incentives, for conceiving of a situation as ripe for legal management, if not solution? When is law part of a managerial strategy, part of a larger constellation of tactics and when an end in itself? What conceptions of risk and compensation operate within businesses and among ordinary citizens that might influence the development of litigation? If the rate of claiming, filing for compensation is increasing at 4% a year as some observers suggest, is this evidence of a major normative shift from some purported historical past? Are there parallels in corporate culture for the reported desire among individual litigants for voice and dignity as a partial explanation for some types of litigation? We simply have too little information and understand too little about what triggers the response to law not only among ordinary citizens, but certainly also among repeat players who have the greater effect in shaping the civil justice system. Before we can reform the civil process, we need to know more about its place in the legal consciousness of all the actors who participate.

I would urge the Ontario Law Reform Commission to create a system for collecting information about the incidences and rates of disputing and civil litigation. I have in mind something like the dual system that now exists in the US for collecting information on crime. Data is collected in two forms. Police departments (approximately 90% of police departments) report annually to the FBI all reported crimes. These data are used to construct the annual reports of



crime. In addition, the NORC at the University of Chicago conducts a survey of victimization in which citizens report any incidents in which they have been a victim of crime. Over the years, there has been a systematic ratio of one reported crime for every two reported victimizations; this pattern is sufficiently stable to become an institutionalized feature of the crime reporting data. A similar system could be created for disputing and civil litigation. Courts could easily computerize their intake procedures to collect important social as well as legal data for each case filed. The court records system could be supplemented by a routinized "legal needs" survey. This latter element is essential if we are not going to repeat the error that early criminal statistics created: systematic under reporting of crime, inability to map the relationship between reporting and social variables/ social structural constraints. Only by collecting both social indicator information on the court filings, and collecting "dispute" information from the populace generally will we be able to draw relatively reliable pictures of the civil justice system and its relationship to socio-cultural factors in the population generally.

COMMENT ON “PROSPECTS FOR CIVIL JUSTICE”

Lynn Smith\*

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The threshold questions which Professor Macdonald formulates for the “Fundamental Issues Group”, mandated to think about longer range implications for the civil justice system, are:

- (1) what problems is the Civil Justice Review meant to address: cost, delay, court overcrowding, or outcomes for litigants?
- (2) which evaluative perspective should be adopted: internal participants, or users and potential users of the system? and
- (3) what data are or could be made available to assist in the assessment of the extent of the problems and the likely effectiveness of proposed solutions?

In making the comments that follow, I assume that the answer to questions (1) and (2) is that a balancing process is contemplated which would take into account all of the problems and perspectives identified by Macdonald, and the kinds of trade-offs he describes and that the answer to question (3) is that very little empirical information is available.

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The following comments, some of which are merely matters of detail and a few of which may suggest more substantial directions for further inquiry, attempt to add to what Macdonald has already done in his very thoughtful and perceptive paper.

## 1. THE ROLE OF THE LEGAL PROFESSION AND THE JUDICIARY

It may be that the “Fundamental Issues Group” or indeed the Civil Justice Review as a whole has been instructed to focus its attention on aspects of the system other than those under the direct control of the legal profession and the judiciary (although I could not see any explicit limitation in the Terms of Reference.) Absent such an instruction, however, I wonder whether there is not also a significant opportunity to address problems in the court system through addressing some aspects of the behaviour of lawyers and judges. Just as the medical profession, by its behaviour and by its participation in decisions affecting system design and use, drives costs in virtually every aspect of the health care system, the legal profession (including the judiciary) plays a key role in the civil justice system.

There are two related ways in which this might be investigated. First, I note that Macdonald writes at the bottom of p. 17, “And in all cases, what kinds of mechanisms should be put in place to ensure that principles of due process—independence, absence of bias or interest, opportunity fairly to present one’s case, consistency of result, openness and accountability—are respected to the appropriate degree by these various non-judicial decision-makers?” Is it appropriate to assume that there is no room for improvement in those areas in the courts, improvement that could increase the public’s satisfaction with the civil justice system? (Although certainly if there is room for only marginal improvement, it may indeed make sense to concentrate efforts elsewhere.)

Second, although there is some implicit reference to the issue of litigation-prolonging behaviour in Macdonald’s discussion of case-management systems, it may be fruitful to focus explicitly on whether or not there are features of the legal culture as well as aspects of the rules of civil procedure that serve to prolong litigation and render it more costly, without a compensating benefit (such as permitting sufficient “ripeness” for settlement). Such a study could examine the economics of law practice, costs rules, case management systems, rules of civil procedure, and more intangible factors such as competitive strutting and preening by lawyers, the possible influence of U.S. litigation practices, the difficulty in reducing levels of preparation once they have been established by opponents or as a norm, and the extent to which repeat clients are able to benefit in terms of increased control over some of these factors.

## 2. THE VIRTUE OF PRECISE LEGAL RULES

As part of his discussion about how the law creates civil disputes, Macdonald argues that “the precision or imprecision of legislative rules is a trivial component of the equation relating to rates of litigation” (*supra*, p. 50). In substance, he is making a point about legislative drafting—perfection in legislative drafting, he asserts, will not ensure more than nominal reduction in civil litigation. But, as Macdonald says, decisions to recognize (or, presumably, to remove recognition from) civil disputes do make a difference. Here, one of his examples seems confusing. On p. 48, *supra*, he states that “[n]o amount of linguistic precision of legal rules will prevent the deployment of legal rules as arguments designed to advance client interest, since the formulation and structuring of legal argument is one of the primary functions of legal rules.” The examples are drawn from U.S. and Canadian constitutional law—the use of the property right in the U.S. Constitution to assert interests in security of the person, and of the security of the person guarantee in the Canadian constitution to assert interests in property. Without knowing which cases he had in mind, I can only comment that in the Canadian context, I have not been aware of many successful assertions of property interests under section 7, nor of any at the Supreme Court of Canada level. Nor do I believe that there has been intense litigious activity on the part of clients wishing to make such claims. Certainly, there has been some, but if it has been limited (as I suspect) to situations in which either the margins of the rule are being tested, or in which there is incompetent legal advice, then there has been considerably less litigation than there would have been otherwise. Thus, this may be an example of MacDonald’s *other* point, that non-recognition of particular civil disputes will dampen efforts to assert them in a particular context. (This is not to dispute that, as with procedural reforms, the chief accomplishment may be simply to move the dispute from one location to another within the system.)

One other example from Canadian constitutional jurisprudence may be considered in this regard. In 1989, in *Andrews v. Law Society of British Columbia*<sup>1</sup> and *R. v. Turpin*<sup>2</sup> the Supreme Court of Canada, by its interpretation of section 15(1) of the Canadian Charter of Rights and Freedoms, restricted the scope of the equality rights by holding that “discrimination” encompasses only claims based on distinctions flowing from personal characteristics listed in section 15 (race, national or ethnic origin, colour, sex, age, mental or physical disability) or ones analogous to those (such as citizenship). Although prior to that decision the great majority of claims brought under section 15 related neither to

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<sup>1</sup> [1989] 1 S.C.R. 143.

<sup>2</sup> [1989] 1 S.C.R. 1296.



enumerated nor analogous grounds, but rather to matters such as environmental regulation affecting aluminum can manufacturers differentially from steel can manufacturers, that pattern has now changed dramatically. Although there was a surprisingly gradual diminution of claims clearly outside the *Andrews*-defined scope of section 15 in the first year following its release, as would be expected there have been few such claims in the recent period.

The general point I wish to make here is that Macdonald's discussion in his section 12 ("The Relationship Between Precision in Legislative Rules and Rates of Litigation", *supra*, pp. 46-51) perhaps focuses too much on what happens once litigation is commenced, and not enough on all of the decisions *not* to commence litigation which are made by rational clients upon receipt of competent legal advice.

### 3. REPEAT PLAYERS AND ONE-TIME USERS

The advantage which repeat players seem to have is referred to at several points in Macdonald's paper. It would be extremely interesting to know more about what the extent of this advantage is and from what sources it might flow: is it the identity of the repeat players (e.g. insurance companies, banks, government, large corporations)? is it the ability to work with their legal advisers to construct long-term litigation strategies in which advantageous trade-offs may be made? is it the prestige and status of the lawyers whom the repeat players retain? is it the ability to influence the legislative and regulatory process? is it the ability of the repeat players or their lawyers accurately to predict, in individual instances, the likelihood of success of litigation before commencing it? Of course, the reason for attempting to learn something about the extent and sources of an advantage for repeat players would be to consider what might be done to improve the accessibility and effectiveness of the system for others.

The announcement of a "litigation strategy" adopted by the Women's Legal Education and Action Fund (LEAF) in 1985 was seen in some quarters as a perhaps sinister attempt to capture the judicial process by a "special interest group". Yet it could just as well be seen as an attempt by an aggregation of individuals (women) usually involved only in one-off litigation over domestic disputes or small-stakes financial matters, to aggregate their resources and interests in order to realize the benefits afforded to repeat players in the system. (As in many other contexts, the terminology can be loaded by questionable assumptions. For example, is "special interest group" an accurate term for organizations attempting to enhance the participation in the democratic process of historically excluded groups (eg women, First Nations people, visible minorities)? Or should the term be used primarily for organizations attempting to enhance the economic or other personal interests of their members?) Underlying the debates on these issues there may be, to some extent, an

assumption that new litigants or forms of litigation do not belong in an already overcrowded system.

Thus, an examination of the dynamics of repeat user advantage, and a consciousness of the barriers that exist against certain kinds of claims and claimants, would be interesting and important components in the Civil Justice Review.

#### 4. CLASSIFICATION OF INTERPERSONAL AND SOCIAL CONFLICT

Beginning in section 28 (*supra*, p. 102), Macdonald addresses the ways in which disputes can be categorized, if streaming of disputes to different resolution mechanisms is contemplated. As he observes, however, the classifications he discusses (source, object, parties, nature) are those traditionally used in the common law and speak to civil disputes, rather than to the underlying interpersonal and social problems. Would it not make sense to try to go somewhat deeper, and consider the types of conflicts themselves, especially if categorization is relevant to issues other than streaming? For example, referring back to my previous point, should there be a categorization system which separates out cases raising equality issues? Perhaps there need not be a system at all, because streaming may not be desirable, but if there is to be one, it seems an important point at which to attempt serious “re-engineering” beginning with the basic categories of thought about disputes.



# AN ECONOMIC PERSPECTIVE ON ACCESS TO CIVIL JUSTICE

Michael J. Trebilcock\*

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## I. INTRODUCTION

Professor Macdonald's paper is rich in insights and raises many profound issues. I do not have remotely his breadth or depth in this area, and thus my reactions are framed at a lower level of abstraction than much of his analysis. As I think about the issues in this area, my particular perspective is that of a law and economics scholar, although I do not for a moment claim that this can capture all relevant values or variables when we are addressing a concept as normatively contestable as access to justice.<sup>1</sup> However, there may be some value in at least sketching how this perspective might orient some of the issues, recognizing that in itself it will be a seriously incomplete framework of analysis. A law and economics perspective on most legal issues attaches a central weight to the *incentive* properties of alternative legal and institutional regimes. I believe that this is an important consideration with respect to many issues in this field.

## II. THE NATURE OF THE POLICY CALCULUS

I deduce from the terms of reference and from the discussion in Professor Macdonald's study that three broad facets of the civil justice system are motivating the review: *cost*, *delay* and *access* (minimizing the costs of litigation, minimizing delay, and maximizing access.) However, there are clearly major tradeoffs across these objectives. Maximizing access may well exacerbate delays. Similarly, minimizing costs may increase access but also delays. Minimizing delays may increase costs, at least for the public treasury, if this entails providing more court resources. More fundamentally, as Professor Macdonald eloquently demonstrates, implicit in the premise that a review is required is either that some cases are in the system and consuming resources when they should not be, or that other cases which should be in the system are being discouraged but should not be. However, at this point as far as I know, we have no clear empirical fix on what classes of civil cases consume most of the time and resources of the court system or what cases which are currently being deterred under the existing system would be forthcoming under a different set of arrangements. Even if we had this empirical data, we would then face profound normative questions as to which cases should be discouraged and which cases should be encouraged relative to existing patterns of civil disputing. Moreover, as Professor Macdonald also emphasizes, it is not particularly helpful to speak about "access to the system", when in fact there are manifold existing and potential dispute resolution systems, which require judgements as to which cases should be screened or channelled into which systems; whether indeed some actual or incipient disputes

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<sup>1</sup> See generally Allan C. Hutchinson (ed.) *Access to Civil Justice* (Toronto: Carswell, 1990).

should be preempted by other legal responses; or whether again some actual or incipient disputes are best treated as lying outside the legal system altogether.

### III. POLICY-MAKING UNDER CONDITIONS OF UNCERTAINTY

Professor Macdonald's analysis of the issues in this area suggests a radical degree of indeterminacy in our state of knowledge. He states at pp. 140-41:

First, we do not know exactly what is currently the state of civil disputing in Ontario. Second, we do not know exactly what is the problem with the system that we are trying to solve. Third, we do not know what perspective to adopt in seeking solutions. Fourth, we do not know what our measurement criteria for deciding as between various alternatives should be. Fifth, we do not really know what these alternatives are. Sixth, we do not know how to distinguish between various types of civil dispute. Seventh, we do not know whether any decisions taken will have the desired effect, or whether they will simply change the patterns of civil disputing in perverse ways.

More tellingly, even were we able to gain a clear appreciation of the "landscape" of disputes, and even were we to decide our standards of measurement, and even were we to have a comprehensive inventory of processes, institutions and civil disputes, we would have advanced only a small way down the desired path. We would still have to undertake empirical analysis and measurement. Then, having done so, we would have to make policy judgements about what to do, not only on the basis of these theoretical models, but also on the basis of our predictions about how potential litigants would react to our proposals. In the final analysis, we are not even certain about the goals we seek to promote in dispute resolution as a social process.

Even assuming, for the sake of argument, that this is an accurate characterization of our present state of knowledge, I think that some caution needs to be exercised in the implications that are drawn from these observations. My own sense is that a similar set of observations may appropriately apply to almost any other major area of public policy-making, e.g. prospective reforms to social welfare policies, changes in macro-economic policy, changes in education policy, changes in immigration policy, etc. etc. Yet the work of the world must go on despite radically imperfect information and bounded rationality in terms of being able to predict all future consequences of possible policy decisions. The real challenge is how to make progress in an area such as access to civil justice given such informational incompleteness. One issue that the task force needs to confront is what information on the current state of disputing must, and can, be gathered now as part of the present research enterprise. Another issue, adverted to by Professor Macdonald, is what system should be put in place now with a view to generating a more systematic database over time. A third issue is, to my mind, perhaps even more important -and that is what kinds of experimental or pilot initiatives might responsibly be undertaken in this area with a view to exploring the domain of the unknown and mapping future possibilities more accurately. As DiIulio, Garvey and Kettl argue, with respect to the recent literature on reinventing government:

One of the basic concepts of contemporary social science, that of bounded rationality, supports the evolutionary approach to institutional reform. According to the bounded rationality hypothesis, policymakers mostly delude themselves when they think that “comprehensive study” or “bold inventive action” can produce useful, enduring change. The world of politics is too rich in both information and uncertainty; once-and-for-all efforts at structural reform must fail. When used as an evocative symbol, the metaphor of invention can help concentrate the mind, charge the imagination, perhaps inspire a certain willing suspension of disbelief. But the inventive approach has its limits as a guide to practical action.<sup>2</sup>

#### IV. TO WHAT EXTENT IS CIVIL JUSTICE A PUBLIC GOOD?

In considering issues that bear on the relationship between public and private provision (e.g. private mediation, arbitration, etc.) of civil justice, we need to think clearly about what aspects of the provision of civil justice constitute a public good. It is traditionally argued by economists that services such as a national defence and policing are public goods, in the sense that once they are provided beneficiaries of the services cannot be excluded from consuming them even if they do not pay for them. Similarly, if there are major positive externalities from the provision of civil justice, clearly it will be suboptimally supplied by private providers. Again, if there are very large economies of scale and scope in the provision of civil justice, one might view it as a kind of natural monopoly that if privately provided would have to be closely regulated or alternatively that should be publicly provided. Alternatively again, one could regard the provision of civil justice, even if not a natural monopoly, as necessarily entailing ultimately the deployment of the coercive powers of the state, which for good social and political reasons, we would not wish to see delegated to private agencies. My own tentative impressions are that unlike national defence or police services, most civil justice services can be priced and rationed. On the other hand, there may be major positive externalities from the provision of civil justice, such as providing an avenue for redressing grievances in a civilized fashion (i.e. writs rather than rifles), and that a tightly coordinated and hierarchical system of civil justice provides some measure of consistency and predictability in decisionmaking by generating and interpreting legal rules which other parties can rely on as precedents in shaping their own conduct. Another example of an externality would be the incentive or deterrent effect on third parties of a decision to require one party to pay compensation to another in respect of some form of conduct (general rather than specific deterrence). On the other hand, I doubt that the inherent economies of scale or scope in the provision of civil justice require, for efficiency reasons, a single monopoly supplier (as evident by the growth of all kinds of alternative dispute resolution mechanisms public and private). Yet to the extent that even these systems depend for their ultimate efficacy on the state enforcing determinations or adjudications made by these

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<sup>2</sup> John Dilulio, Gerald Garvey, and Donald Kettl, *Improving Government Performance: An Owner's Manual*, (Washington D.C.: Brookings Institution, 1993) at p.2.



mechanisms, one probably needs to view private and public adjudication as complements at least to some extent, rather than substitutes, in that the public justice system may ultimately be called on to enforce awards, and is unlikely to do so without maintaining some degree of supervision over how these determinations have been reached. As one thinks about the channelling or screening process, as Professor Macdonald has described so fully, and the richness of the institutional options available for channelling different kinds of legal disputes, it strikes me as important to ask in each case whether there are public goods aspects to the class of dispute in question which require a public institutional presence (and what kind of presence).

## V. THE CASE AGAINST STRATEGIC PLANNING AND FOR INSTITUTIONAL PLURALISM

While Professor Macdonald at p. 9, fn 4 of his report expresses a sceptical view of strategic planning, the proposals he advances in Appendix V for allocating civil disputes to different institutional channels seems to me to neglect this caution and to entail highly contestable normative judgements, which exemplifies everything that is wrong with *a priori* system-wide planning. For the reasons given above, we simply do not have the information to engage in system-wide strategic planning or massive paradigm shifts but rather should settle for a series of incremental institutional experiments—what Charles Lindblom referred to in a classic article as the “science of muddling through”.<sup>3</sup>

From a law and economics perspective, in the present and other contexts, virtues are often seen in simply creating socially appropriate incentive structures and letting individuals make choices—in this case which institutional avenue of redress to pursue—in the light of this incentive structure. In other words, pricing mechanisms are often preferred to command-and-control forms of regulation. In the present context, to the extent that we believe the formal court system is both overburdened and overutilized from a social perspective, I would argue that the presumptive response should be to price the services provided by this system at fully allocated social cost so that all litigants utilizing the system perceive not only their private costs but also the full social cost of the services provided. This is likely to have at least two effects: in many cases to induce settlement rather than litigation, and in other cases to utilize alternative forms of dispute resolution as a substitute for formal litigation. With respect to the second alternative, we need to ask, following my discussion of the public goods aspects of the provision of civil justice, whether inducing parties to rely on alternative forms of dispute resolution, including importantly private forms of dispute resolution, may compromise some of the public goods aspects of public provision. For normal

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<sup>3</sup> Charles Lindblom, “The Science of ‘Muddling Through’”, (1959) 19 *Public Administration Review* 79.



two-party commercial and related litigation, it is not obvious to me that this is so. However, given that the determinations made by these alternative forms of dispute resolution must ultimately be enforced by the state, through the public courts, we need to think clearly about what forms of public supervision are required of these private alternative forms of dispute resolution. As Professor Macdonald points out in his paper, one could imagine *ex ante* certification by the legislature or some other public agency of these mechanisms, either with respect to the required qualifications of the arbitral personnel or for the processes of decisionmaking that must be employed, or both. Instead, or as well, one could imagine *ex post* judicial supervision, through rights of appeal or judicial review, although here to the extent this *ex post* judicial oversight function more closely resembles a rehearing on the merits, to that extent these alternative dispute resolution mechanisms cease to be substitutes for, but rather complements to, formal judicial adjudication and arguably contribute only modestly, if at all, to conserving on judicial resources.

Supposing, as a presumptive matter, that all court services were priced at their fully allocated social cost, while this would *not* entail, obviously, any radical privatization of the court system, it would promote a significant degree of *competition* amongst alternative providers of civil justice services. In addition, it would provide more resources to the public civil justice system, which could conceivably be deployed to increase the supply of services in that system. However, here we probably cannot avoid some *a priori* classification of classes of claims entailing major social or economic externalities where the parties to the dispute should not be required to bear the full social cost of resolving the dispute. I have in mind, firstly, that claims involving constitutional challenges to government legislation or regulations would fall into this category. Similarly, human rights claims are often likely to possess this characteristic. Again, major challenges to long-standing doctrinal rules or litigation over novel issues that have a test case character to them probably also present this dimension (applying something like the Supreme Court of Canada's "public importance test" in reviewing leave applications). But surely these cases constitute a tiny percentage of the total workload of the formal court system. By publicly subsidizing *all* civil litigation, we have substituted untargetted for targetted subsidies. Targetted subsidies might, through e.g. the legal aid system, subsidize impecunious litigants with claims that potentially exhibit these significant externality characteristics, or in appropriate cases the courts might waive the allocation of all or some of the fully allocated social costs of determining a dispute for other litigants. But, whatever the mechanism, surely we need to think hard about how to target the subsidies entailed in the public provision of civil justice much more finely, and outside the classes of disputes entailing targeted public subsidies foster competition between the public court system and alternative privately provided forms of dispute resolution.

One irony in this approach is that the case *against* maintaining a public monopoly in the provision of civil justice services seems strongest where only the litigants' interests are entailed, and the case *for* public provision seems strongest where there are major externalities associated with judicial decisions, thus increasingly focusing the resources of the formal court system precisely on those cases that many commentators have argued in the past are least appropriate for judicial adjudication i.e. cases with major polycentric features or that involve major judicial balancing of competing values or entail, in effect, a major policymaking role.<sup>4</sup> We need to ponder whether we should be open to turning conventional wisdom about the appropriate role of judicial adjudication so sharply on its head.

## VI. A DECISION-TREE FRAMEWORK FOR CONTEMPLATING INSTITUTIONAL OPTIONS IN THE PROVISION OF CIVIL JUSTICE SERVICES

I find it useful, as a mental exercise, to trace through sequentially how one might respond to various classes of legally cognizable *interests* (not necessarily claims) from the moment at which the legislature or some other lawmaking body has determined that a particular class of citizens has a legally cognizable interest, taking that initial judgement for our purposes as a given. Here, it seems to me to be useful, at a middle level of reflection and abstraction, to consider the range of institutional options with respect to issues of cost, delay, and access by reference to both supply-side and demand-side options at each juncture along this sequence. With respect to supply-side options, I have in mind options that would change the quantity or quality or nature of the supply of dispute resolution services. With respect to demand-side options, I have in mind various options that would change the configuration and level of demand for various kinds of dispute resolution services.

### (a) PUBLIC OR PRIVATE LAW ENFORCEMENT

Assuming, for the sake of argument, that the legislature has decided that a particular group of citizens or constituency has a legally cognizable interest that the law should protect, perhaps the first issue that arises is whether this interest should be protected through public sanctions or private claims. In some cases, the legislature could pre-empt subsequent disputes through criminal or regulatory prohibitions or requirements of one kind or another that are publicly enforced. Where the protected class is large and dispersed, and individual claims relatively small, public enforcement in many cases would seem be more efficient than

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<sup>4</sup> See e.g. Lon Fuller, "The Form and Limits of Adjudication", (1978) 92 Harvard L.Rev. 352.

requiring individuals to prosecute their claims on an individual basis. In some cases, it may be efficient to contemplate expanded utilization of class action procedures in order to aggregate these claims and adjudicate them through the civil justice system, but nevertheless a key threshold issue is whether to rely predominantly on public or private enforcement. With increasingly severe fiscal constraints on government resources, there is likely to be an increasing tendency to seek to provide relief to constituencies in an off-budget fashion e.g. through civil redress mechanisms, even though in principle it may be more efficient to deal with these concerns through publicly enforced sanctions or regulatory requirements. This may be largely a fiscal illusion in that while the government conserves on demands on its own expenditure budget, there may be increased costs in resourcing the public civil justice system and more importantly much more substantial costs of law enforcement which have to be privately borne, but which are nevertheless real social costs.

### (b) PUBLIC LEGAL EDUCATION

Assuming that the state chooses not to rely exclusively on a public law response to these concerns, but instead, or in addition, assumes that there should be some significant role for private initiatives by citizens with legally cognizable interests in protecting these interests, a series of public policy initiatives, escalating in scale, might be contemplated. First, the state could largely confine itself to providing forms of public legal education either with a view to enabling citizens to avoid potential disputes in the first place by appropriately ordering their affairs or conduct, or educating them on how to prosecute complaints effectively on a self-help basis.<sup>5</sup> Professor Macdonald acknowledges that he does not address this set of issues in this paper. However, I think they should not be dismissed. My own sense, like his, is that most citizens with legal grievances do not have in mind major constitutional challenges, applications for judicial review of administrative agency decisions, or human rights issues, but quite low level or small scale complaints against firms, landlords, or bureaucracies, and indeed have a strong aversion to entanglement either with lawyers or courts, or anything that looks like lawyers or courts, not only because of the cost and delays but because of the stress and general unpleasantness associated with a structured adversarial process.

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<sup>5</sup> See e.g. Gregory Kane and Edward Myers, "The Role of Self-Help in the Provision of Legal Services", in Robert Evans and Michael Trebilcock (eds.) *Lawyers and The Consumer Interest* (Toronto: Butterworths, 1982).



### (c) INFORMAL DISPUTE RESOLUTION

This leads me to another suggestion. Beyond providing public legal education in one form or another (which forms need to be carefully evaluated), the state might consider ways of either facilitating or in some cases mandating informal dispute resolution processes within firms, bureaucracies, or other government agencies. My own casual impression is that for the average citizen, the principal frustration often experienced is getting an electronic voice on a phone with a large firm or a government bureaucracy, or dealing with a low level clerk with no authority to respond effectively to a complaint, or being shuffled endlessly from one person in the firm or agency to another. For example, requiring firms with retail sales over a certain size to provide a 1-800 number and a designated person in charge of customer relations who is publicly identified in sales, other literature, receipts etc. might be largely responsive to these frustrations. Indeed, a number of large retail chains or appliance or car manufacturers do this now. In addition, to proceed to another stage, one could imagine the state either facilitating, or in some cases mandating, the provision of some kind of internal or industry-wide informal arbitration system where citizens with a grievance that is not satisfactorily resolved in the customer relations department can seek resolution through an informal adjudication process, perhaps principally based on letters and written material but entailing an independent adjudicator. As to whether the state should simply facilitate these mechanisms or mandate them is a difficult question. It could facilitate them by certifying personnel and processes and widely publicizing the nature of these, allowing firms to opt into them as a way of signalling a commitment to quality of service, with the signal being rendered less ambiguous and more credible by virtue of the state having certified this informal arbitral regime. In other cases, the state may wish to mandate the creation of such regimes on an industry-wide basis, if problems have been pervasive in an industry, rather along the lines of the New Home Warranty and Travel Insurance programs in Ontario.

There is also much to be said for greater utilization of informal hotlines of the kind run by some government Consumer Protection Bureaux, the Ombudsman's Office, the Employment Standards Branch, or Better Business Bureaux. In order to give this kind of process teeth, apart from any public law enforcement sanctions that may be at the disposal of a public agency, I think greater use should be made of publicity, through periodic publication of the compilation of complaints by parties complained against and percentages of successful resolutions, thus enhancing the operation of reputational markets. To the extent that systematic data collection from these more informal dispute resolution processes yield patterns of complaints that are better dealt with by pre-emptive legislation enforced through public sanctions, this in many cases is likely to be a preferable option to the prosecution of individual grievances.



In other cases, the state might consider making more widely available largely self-executing remedies, like the cooling-off period provided under consumer protection legislation for door-to-door sales, which provides an extremely low cost remedy to consumers who may have been victims of overreaching tactics by door-to-door salesmen. Again, larger or more reputable firms already provide this assurance or signal of quality to their customers by providing a satisfaction guaranteed or money back assurance for all their sales.

#### (d) WHOLESALE RATHER THAN RETAIL CIVIL JUSTICE

For other classes of disputes, other approaches may be more appropriate. For example, with respect to workplace injuries, Ontario, like most other jurisdictions, for most of this century has provided an administrative compensation system. Much more recently, Ontario has adopted an automobile no-fault insurance system. In considering administrative agencies as alternatives to courts in the provision of civil justice services, one needs to think carefully about exactly what it is that these agencies can provide which courts cannot. One characteristic that they may possess is specialized expertise, even though they may continue to employ many of the same processes of inquiry and adjudication as courts (e.g. the Canadian Competition Tribunal or the Environmental Assessment Board). However, apart from specialized experience, they may also employ radically different processes for determining claims. With respect to workers' compensation, one can view processes of determining claims here to be providing civil justice, in important respects, on a *wholesale* rather than *retail* basis, in that individualized determinations of fault on the part of employers are not required and compensation is largely provided according to a pre-determined scale, so that individualized determinations of quantum are much less open-ended. With respect to other legal claims presently being processed through the formal court system and with respect to claims that presently, for the most part, do not find their way into any formal system of adjudication, we need to ask ourselves whether civil justice can be provided, in some range of these cases, on a wholesale rather than retail basis. Giving specialized administrative tribunals properly structured rule-making powers may sometimes facilitate this process.

#### (e) JUDICIAL OVERSIGHT OF NON-JUDICIAL ADJUDICATIVE SYSTEMS

Assuming either in the case of many classes of small claims that we have gone the informal arbitral route or in the case of other classes of larger claims we have chosen to assign them to an administrative agency to process to some extent on a wholesale rather than retail basis, we then need to think clearly about the relationship between these decisionmaking agencies and the formal court system with respect to rights of appeal or rights to a judicial review. As noted earlier, this issue cannot be entirely escaped to the extent that determinations by

these other agencies may ultimately have to be enforced through the coercive powers of the state, and courts quite properly are unlikely to simply enforce these awards mechanically without some assurance that justice has been done and some basic elements of due process respected. However, too expansive a role for a judicial oversight will clearly undermine a large part of the purpose for designing or fostering alternative dispute resolution mechanisms *as substitutes* (not complements) to formal judicial adjudication. Informal arbitral mechanisms or wholesale rather than retail dispensation of civil justice are likely to raise difficulties for the courts, on the one hand because the informal processes employed may seem sharply at variance with conventional judicial adjudication processes (and notions of due process) or on the other hand because civil justice dispensed wholesale will lack the individualized attention to the merits of claims on a case-by-case basis. Thus, some attention needs to be paid both to framing appropriate privative clauses in these regimes that strike an appropriate balance between the need for some judicial oversight and the need for considerable judicial deference, and also exploring more fully the notion raised in Professor Macdonald's paper of *ex ante* certification by the legislature of either the processes or personnel (or both) employed in these processes as a *quid pro quo* for substantial immunity from *ex post* judicial oversight.

#### (f) SMALL CLAIMS COURTS

With respect to residual classes of small claims for which the above systemic responses are thought to be inappropriate or in any event have not been adopted, I think we need to look harder at the current operation of Small Claims Courts. Issues seem to me to arise here on both the supply and demand sides. On the supply side, it occurs to me that we should consider the idea of appointing part-time small claims court judges to sit either on a *pro bono* or nominal fee basis in evening or Saturday sessions, e.g. lawyers with at least six years' experience. It may well be an attractive source of experience for practising lawyers with an interest in litigation (subject to conflict problems) to provide e.g. one evening or Saturday morning a month sitting on Small Claims Court cases for a nominal fee. On the demand side, while I once thought that there was a merit in the case for excluding lawyers from small claims courts, I now believe this view is probably ill-founded, in part because it is likely to lead to less focussed and less well-prepared cases being presented by claimants and inefficient use of court resources being entailed in sorting through these claims. However, one could contemplate many of the legal services being provided by second and third year law students for nominal fees paid by litigants either to the students themselves or probably more commonly to the student legal aid clinic with which they are associated. More generally, I believe that we need to question the monopoly that lawyers have on the representational function in many contexts. While this monopoly has been eroded in some contexts (e.g. the provision of legal services to citizens charged with traffic offences where former police officers now operate private

legal services firms; non-lawyer representatives of injured workers with workers' compensation claims), there would seem much to be said for contemplating special training programs for paralegals in community college programs that are designed to provide a cadre of paralegals operating on their own account or in law firms who can provide low-cost representational services not only in small claims courts but in other dispute resolution forums (other than higher levels of formal judicial adjudication).<sup>6</sup>

In many of the above observations, I have stressed the importance of providing effective means of resolving small scale grievances, because I believe (correctly or incorrectly—we may want to ask how this impression can be verified) that for the great majority of citizens this is the kind of complaint that will be of concern to them and the frustrations they often currently experience in effectively prosecuting such a complaint are unlikely to be resolved by any formal process of adjudication.

#### (g) REFORMING THE FORMAL JUDICIAL ADJUDICATION PROCESS

At the end of this sequential analysis of policy responses to legally cognizable interests, we at last come to the role and functioning of the formal judicial adjudication system. I have already indicated that I favour investigating seriously the notion of pricing the services of the system at fully allocated social costs, with incentive implications that will feed back up the sequence of institutional options already reviewed. Beyond this suggestion, however, the complex trade-offs between costs, delay and access need to be addressed within the judicial adjudication system. One option that I do not think holds out much promise is simply to increase the number of judges and support staff in the traditional court system. Apart from the fact that the province may well feel it lacks the financial resources to fund a major expansion of the system, there are serious questions as to whether in the longer term this would have any effect on delay. This is an area where incentive issues have to be carefully analyzed. For example, if doubling the number of judges in the system reduced the average delay in the general court system from filing a suit to resolving it from e.g. two years to two months, one could confidently predict the direction (if not the magnitude) of the likely effects. First, a number of cases that are presently settled, because of the costs and inconvenience of delay, will now be litigated, thus increasing the supply of litigated cases. In other words, the price of litigation relative to settlement has been reduced. Second, the reduced delay will draw cases into either the settlement or litigation stream that previously were not subject to formal suit at all. Thus, I would expect (as I believe past experience has tended to demonstrate in many jurisdictions) that increasing the capacity of

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<sup>6</sup> See e.g. Frederick Zemans, "The Non-Lawyer as a Means of Providing Legal Services", in Evans and Trebilcock *op.cit.*



the system has a short run impact on delay, but this usually evaporates either largely or completely over time. However, this is not a reason for not utilizing existing resources as productively as possible, even though this means speedier resolution of cases, which will also draw new cases into the court system, perhaps again increasing delay over the long term, but arguably improving access in the sense that more litigants actually have their day in court.

While it appears to be contrary to trends towards consolidating formal judicial adjudication into a general court system, it seems to me possible that some savings in costs (and possibly delay) could be achieved by greater specialization in adjudicative functions (e.g. a specialized commercial law court; a specialized unified family law court). This in turn is likely to lead to a more specialized bar. Greater specialization in turn is likely to lead to a higher rate of pre-trial settlement, simply because a higher level of specialized expertise on the part of advocates and judges is likely to reduce the degree of uncertainty about adjudicated outcomes.

By way of further encouraging settlement there needs to be some investigation of possible reforms to existing cost rules so that if e.g. a settlement offer is rejected and the result at trial is less favourable to the plaintiff than the settlement offer, the plaintiff bears all the defendant's legal costs from the time of the offer onwards. Conversely, if the result at trial is more favourable to the plaintiff than any settlement offer from the defendant, the defendant should bear the full legal costs of the plaintiff from the time of the offer onwards.

I think that there is also a case for ensuring that the private parties and their agents (lawyers) more fully confront the social costs of delay that they engender in the system e.g. by seeking last-minute adjournments etc. Where these delays cause down-time in the utilization of judicial and support staff, the cost of these delays should be imposed on the parties causing them.

More generally, it seems to me that a much wider range of matters could be determined on written rather than oral evidence, and that a severely reduced role should be provided (as in many foreign jurisdictions) for the discovery process. Most other institutions in our society e.g. families, firms, public sector agencies, private sector non-profit agencies, and indeed state cabinets, make far more important decisions than are often made by courts, without the dramatic ritual of "the full-court press" that is typically entailed in formal adversarial proceedings.

On the demand side, with respect to cases that would remain in the traditional court system, a variety of expedients for reducing legal costs might be contemplated. These costs can only be reduced by; (1) reducing the cost of inputs; (2) spreading costs over individuals or through time (insurance) or; (3) direct subsidies (e.g. legal aid). For example, class action procedures may realize economies of scale in litigation where individual members of a class have similar claims, thus reducing the costs entailed in individual prosecution of each



claim, and/or enhancing access where many of these individual claims might not otherwise have been brought. Various forms of legal insurance may also permit some spreading and reduction of costs with respect to litigation. Here, my impression is that most existing pre-paid legal service plans focus on legal services other than litigation.<sup>7</sup> This strikes me as perverse. Small-scale legal costs such as residential conveyancing costs are relatively predictable and contained, and not typically the kind of costs that people find it rational to insure against. On the other hand, with litigation costs, which may be both substantial and unpredictable, individual insurance presents a problem, because of adverse selection problems, reflecting a possible predisposition for litigation on the part of an individual who would seek insurance, rendering private insurers circumspect about providing such insurance. Somewhat analogous to the disability insurance market, group insurance (perhaps mandatory) is likely to work best in this context, with a significant element of co-insurance. Group insurance also offers prospects of cost-reducing agreements being negotiated with legal service providers, who are offered some assured volume of work in return for volume discounts. In order to maximize the scope for this form of legal insurance, many traditional legal constraints, such as medieval rules on maintenance, champerty, and barratry and rules prohibiting restrictions on choice of lawyers may have to be reevaluated. Along the same lines, as I have argued elsewhere<sup>8</sup>, a carefully crafted contingent fee regime may permit costs and risks of litigation to be shifted from plaintiffs to their lawyers, thus reducing the cost deterrent, and at the same time increasing access.

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<sup>7</sup> See e.g. C.J. Wydrzynski, "The Development of Prepaid Legal Services in Canada", in Evans and Trebilcock *op.cit.*

<sup>8</sup> Trebilcock, "The Case for Contingent Fees", (1989) 15 Canadian Business L.J. 360.

# COMMENT ON “PROSPECTS FOR CIVIL JUSTICE”

Garry D. Watson\*

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In examining the fundamental issues in a civil justice review we must keep in mind that it is not possible to “go back to square one”. Like it or not our options are “path dependant”—conditioned and limited by where we have been. (See B. Friedman’s review of a book by Paul Krugman in *The New York Review*, October 20, 1994, and his illustration of the seeming impossibility of getting rid of the antiquated QWERTY keyboard which was originally designed so as to slow down typists at a time when mechanical keyboards used to stick). In my contribution to this enterprise I will largely focus on “where we have been” and examine why both court reform and procedural reform have proven so difficult to date. I do not wish to suggest that because of our past we cannot move forward. Rather I think that if we are to move forward, successfully, we need to understand where we have been and what we are fighting against. In addition, reflecting on where we are is important because, no matter how hard we try we will likely end up in the new landscape of dispute resolution with much of what we already have—there will continue to be a central role for court based adjudication and the continuing need to struggle to make that system operate more effectively.

At the outset I raise some questions pertaining to the suggestion that some classes of disputes or disputants should be excluded from the publicly-funded system, and I also make some observations as to the lack of any tradition of ADR in Canada and the implications of this for reform strategies. At the end of the paper I turn briefly to explore “some mere tinkering with adversarial adjudication” (Rod Macdonald’s paper, p. 93) and ask whether it is possible to de-emphasize the fact finding aspect of adjudication which consumes so much time and money.

# **1. MANDATING PRIVATE DISPUTE RESOLUTION: VIEWING PUBLICLY-FUNDED DISPUTE RESOLUTION AS PART OF “THE SOCIAL SAFETY NET” AND THE SUGGESTION THAT THIS BENEFIT SHOULD BE SUBJECT TO A MEANS TEST**

One of the items in the Group’s mandate states:

What classes of civil disputes should be resolved through publicly-funded mechanisms, and which through private dispute resolution mechanisms?

This question suggests that a regime might be put in place under which certain classes of disputants (e.g. the business community) would be *required* to resolve their disputes privately, and at their own expense, and would be precluded from having resort to publicly-funded mechanisms e.g. the court system. Such a mandatory approach seems to be implicit in the question, since today if litigants prefer private dispute resolution they can of course resort to it. What is being asked, I take it, is for us to consider in what circumstances private dispute

resolution should be *mandated* as opposed to the present situation under which any party may resort to having any (legally cognisable) civil dispute resolved by the publicly-funded courts or tribunals.

Such a proposal has been floated before in provincial government circles as a possible, partial solution to the problem of court congestion and delay and that it might go some way towards granting the courts “relief”. This approach appears to conceive publicly-funded dispute resolution as just another government service which is part of the “social safety net” (which includes the Canada Pension Plan, Unemployment Insurance, legal aid and universal health care) and that a possible solution to its “overuse” and escalating costs is to ration it by imposing, in effect, a “means test”. A more cynical way of stating the same view is that the government is simply saying that it believes the civil justice system is costing the government, which is burdened with trying to reduce its deficit, too much money and it wants to reduce or cap its expenditure on civil justice. The process is akin to a corporate restructuring, i.e. “we want to down-size to reduce our capital investment and expenditures”, and should not be confused with more traditional government initiatives in the justice area, i.e. the desire to create a better world for our citizens by improving the way in which civil disputes are resolved, e.g., more speedily, at less cost to them, etc.

My first reaction is that analogizing the court system to the social safety net is wrong. The publicly-funded dispute resolution system, which up until now has required mandatory participation by the parties once invoked, performs a more basic function than do the various elements of the social safety net. Over much of history the social safety net did not exist but the existence of a publicly-funded court system—designed to resolve disputes and avoid anarchy—goes far back into history. Second, I believe that any proposals that would forbid classes of disputants from resorting to the publicly-funded dispute resolution system would be politically unacceptable and hence unachievable. Third, the task of drafting the jurisdictional boundaries as to what classes of cases are included and excluded from the system, assuming that it would be aimed at excluding certain types of disputants (e.g., the business community), would be difficult. For example, some types of business community disputes could easily raise important questions of public policy, including constitutional law, matters which I assume we would not wish to exclude from the court system.

A less drastic approach that might go towards achieving some of the same objectives could be to explore imposing increased user fees for certain classes of cases or for proceedings where the trial lasts longer than a specified time. The practice of imposing fees on litigants who choose trial by jury, which is the practice in some provinces in Canada, perhaps provides a precedent here.

The objections noted above do not apply to proposals to introduce or extend ADR programs *as part of* the revamped publicly-funded dispute resolution



system. (Indeed once the issue is raised, it is difficult to see what could justify the publicly-funded dispute resolution relying solely on one method of dispute resolution—adjudication). However, these proposals do raise their own issues. Can ADR be integrated into the existing system in such a way as to avoid a duplication of effort? Will their introduction represent a saving of either public or private costs? Will such procedures operate in a way which is fair to the parties? Will they lead to a proliferation of privacy within the publicly-funded dispute resolution system and is this acceptable? I note in passing that most of these considerations are non-issues when resort to ADR is left to market forces and is based upon consensual agreement between the disputants.

## **2. BACKGROUND — THE LACK OF AN ADR TRADITION IN CANADA AND ONTARIO**

As we consider greater use of ADR as part of the publicly-funded dispute resolution system I believe we need to take stock of and keep in mind the extent to which ADR has been part of—or rather not part of—dispute resolution in Canada.

No tradition of consensual arbitration exists in Canada outside the labour relations field (where grievance arbitration is in fact mandated). We have no long-standing tradition of consensual commercial arbitration (contrast Europe, e.g. Sweden, or even the U.S.A.) nor do we have a tradition of intra-industry arbitration. Similarly outside the labour field (and perhaps such areas as Northern development) we have no tradition of resort to mediation as a dispute resolution technique.

Turning to the contemporary situation, it seems clear that Canada and Ontario have been “slower on the uptake” in respect of resort to ADR in its various forms—consensual arbitration, mediation, mini-trials, etc. It is happening and change is occurring, but the embracing of ADR has been much slower than in the United States. There are likely a number of explanations for this e.g., the lack of any traditional ADR base on which to build means there is a lack of familiarity with such processes among those (i.e., lawyers) who could recommend and participate in them; and, possibly, the fact that ADR has been marketed to the wrong people (i.e. lawyers) rather than to the actual disputants (e.g. business). Indeed it may turn out that the major contribution to be made by the court mandated mediation project in Ontario is that it will force lawyers to become familiar, and perhaps comfortable with, mediation.

If this analysis is accurate, what are the implications for reforming our dispute resolution system? First, simply leaving market forces to bring about a greater shift towards ADR may be too slow or ineffective. At present there is no vigorous private market in Ontario for ADR: there are plenty of would-be sellers, but at present there are few buyers. Consequently, there may be a role here for

creating incentives to resort to ADR or to pursue familiarization strategies to encourage a voluntary shift to more private ADR. Secondly, the fact that ADR has been little used to date, and hence disputants and their advisers are unfamiliar with it, may make it politically difficult, at least in the short term, to *mandate* ADR as part of the publicly-funded resolution system.

### 3. “IT AIN’T EASY”: DISPUTE RESOLUTION REFORM IS DIFFICULT, VERY DIFFICULT

I believe we must not lose sight of this fact. History suggests such a conclusion since for much of this century (in Canada, England and the United States) we have battled with the problem of delay in the courts, the high public and private costs of litigation and access to justice. In all three countries, even in the last twenty year, there have been a plethora of commissions, inquiries, and court, bar and government initiatives directed to grappling with these problems. Unless we assume that the people involved in these exercises were incompetent or malevolent I suggest our limited success to date demonstrates just how difficult is effective reform in this area. Further, I doubt that jumping on the “new bus”—ADR—will radically change this, as some may think. ADR may indeed help, and we certainly should try it, but I think we should not start thinking about it as *the* panacea.

We need to try to understand why dispute resolution reform is difficult. Let me suggest two reasons. The first is that the courts are a complex system and their inputs and outputs may be interrelated in a frustrating way. (Moreover, it seems likely that courts are not unique in this respect and that ADR systems will exhibit similar characteristics.) Second, there is a tendency at least in some circles to talk about the major problems—the reduction of cost and delay and increased access to justice—as if these were absolute goals, rather than ones which are replete with a whole series of underlying conflicting values which have to be reconciled.

Let me develop my second point first. We too often talk about “access to justice” as if it were an absolute value when it clearly is not. This can be illustrated simply by putting forward the following “slam dunk”, quick fix solutions to increasing access to justice (adjudication) in Ontario, ones that deal only with cost impediments to access. These would be to

1. abandon the indemnity rule that costs should follow the event (i.e. attorney fee shifting)
2. legalize percentage contingent fees

3. fix by law the fees the lawyers may charge in litigation
4. dramatically increase legal aid in civil cases.

But we do not blindly take these steps because there are quite obviously competing values. (I note in passing that all of the above are just as relevant to ADR techniques as to court adjudication.) Generally we would like to increase access to justice but not at “any cost”: the goal of access must obviously be balanced against other competing values.

(By way of aside, is there an assumption permeating this exercise that “ADR is good and court adjudication is bad?” If so what is the empirical basis for this assumption? If there is none, is there at least a popular perception—among actual consumers—that this is so?)

#### 4. THE COMPLEXITY OF COURTS AS A SYSTEM

I am going to take the first point mentioned above and develop it separately since I think it is crucial to a better understanding of why dispute resolution reform—combatting costs, delay and improving access to justice—is difficult.

*The role of settlement.* Central to the operation of the court system is the role of settlements. While we refer to resort to the courts as “adjudication”, we know that only somewhere between 2%-5% of cases entering and exiting the system are ever adjudicated (tried); most are disposed of by default judgment or settlement. Let us assume for the purposes of this discussion some arbitrary (but probably reasonably accurate figures) i.e. that of all cases filed 30% result in default judgements, 65% are settled and 5% end up being tried.

Notice how delicate is the system. If we could increase the settlement rate (of the 100% of cases)—by just 5%—there would be no cases left to try! However, if the settlement rate (of the 100% of cases) were to dip by just 5%, the already overwhelmed court system would be paralysed, because the number of cases requiring a trial would double!

There are a couple of points worth noticing here. First, ADR is alive and well and lives in the court system—65% of all cases filed are settled, chiefly through *negotiation*. “Bargaining in the shadow of the law” takes place in the course of litigation and results in the vast majority of lawsuits being settled, not adjudicated. Second, high settlement rates are absolutely crucial to the functioning of our present court system—without them it would be dead! This perhaps explains why so much reform (e.g. the introduction of pre-trial conferences and court-mandated mediation) focuses on increasing settlement



rates. However, what these efforts overlook is that settlement rates are “naturally” already so high that it may be very, very hard to increase them, and whether pre-trial conferences do, or court-mandated mediation can, meaningfully increase settlement rates. (This is why it is so important to attempt to measure the impact of such settlement-oriented reforms. This matter is discussed further below.)

*Cost reduction: public v. private costs.* Reducing the cost of litigation has been a goal (or a pious hope) of virtually all reformers. Obviously, there are two distinct types of litigation costs. Most obviously there are the “private costs”—what it costs litigants to litigate (which in Ontario includes the principle of cost indemnity and the absence, in law though not in fact, of contingent fees). The other aspect of litigation costs are the “public costs”—what it costs government to run the court system. While these two types of costs are analytically distinct, they frequently become interrelated in practice. This is most easily illustrated by reforms which externalize or transfer costs from one sector to the other, typically from the public sector to the private sector. A mundane example is requiring litigants to prepare motion records and factums (briefs) on interlocutory motions—a change which reduces the time a judge must spend on preparation, and may improve the judge’s performance, but increases lawyers’ fees. A more dramatic example is the recent English reform requiring litigants to prepare, exchange and file witness statements with the court. Designed to both improve the quality of the adjudication process and to reduce court time (by dispensing with examination-in-chief at the trial), the general view is that this move has added greatly to the private costs of litigation since the process of preparing witness statements is time consuming and expensive. Similarly, current proposals to reintroduce venue rules in the Ontario Court (General Division) with a view to decentralizing work away from Toronto, which is perceived as an aid to relieving courts congestion at that centre, may lead to an increase in private costs by requiring litigants to pay for the travel expenses and time of their Toronto counsel to attend at these other centres.

*The problem of gains and costs in court system change.* There is certainly a general consensus that we should reduce delay in the courts. I also believe it is a shared objective that we should reduce the private costs of litigants—an objective that is, in my experience, even shared by partners of law firms who directly profit from the high cost of litigation (which is, for the most part, lawyers’ fees). On the issue of reducing public costs there may be less of a consensus. While the government sees this as an important goal, I suspect the legal profession feels that government economies would be better achieved in other sectors. Also, probably actual litigants, as opposed to the public at large, might prefer to see more government expenditure on the court system. In any event, let us look at the impact of possible reforms on the performance of the court’s system and on public and private costs.



First, let us consider reforms designed to increase *the percentage or number of cases disposed of by settlement*, e.g. early judicial settlement conferences, pre-trial conferences, court mandated mediation, etc. From the public cost perspective, unless such efforts increase the overall settlement rate above 65% (using the figures described earlier), the reform simply involves a new increase in public expenditures, i.e. the judge or mediator's time spent. Even if the intervention appears to "result" in settlement, these are settlements that, so the data tells us, would have settled anyway. Hence, in these circumstances what we have is an inefficient expenditure of money by the government, unless (a) earlier settlements result and (b) the government values reduction in delay (through earlier settlement) over the increased expenditure on judges, mediators, etc. From the private cost perspective, if there is no increase in settlement rates, or earlier settlements than would have resulted without the new procedural intervention, these procedural changes represents a financial dead weight loss, i.e., additional lawyer time is involved and must be paid for with no gain to the litigant. (Of course litigants may be happy to pay for earlier settlements and if cases settle earlier there will likely be a cost saving, if the cost of the lawyer participating in the new procedures is less than the costs incurred with a later settlement.)

What conclusions can be drawn from the above? As already indicated, if these procedural changes do not achieve the goal of increasing settlement rates or bringing about earlier settlements they are cost inefficient at both the public and the private level. However, if the procedural change is effective, leading to a reduction in private costs and delay then, to the extent that costs and delay fetter access to justice, the successful procedure may lead to more cases entering the system. And if more cases enter the system in sufficient numbers the system maybe worse, not better, off despite the initial gains from the new procedures.

An essentially similar analysis applies to procedural changes designed to bring about a *speedier adjudication*, e.g., a broadened summary judgment procedure or court mandated arbitration. From a public cost perspective there is the risk that all that will result from such procedural changes is the early resolution of cases that, left alone, would have settled anyway, and the disposition will have consumed additional resources (the time of the judge or arbitrator) without any increase in overall disposition rates. Of course, if any case disposed of by these methods is one that would have been tried, savings may result assuming that a motion for summary judgment or an arbitration requires fewer resources than a trial. Such procedures may lead to earlier dispositions (their primary objective) but this may not be "cost free". With summary judgment motions, there is always the risk that the court will conclude that the case cannot be resolved on the motion for summary judgment, resulting in a waste of judicial (and private) resources on the unsuccessful motion for summary judgment. The benefit of earlier disposition (delay reduction) may well result from binding (as opposed to non-binding) court mandated arbitration— but any scheme that made such arbitration binding might be subject to constitutional

challenge if the arbitrator is not a judge. From a private cost perspective the analysis is again similar to settlement-oriented interventions (see above) and the analysis just presented as to the public perspective. Overall, there is again the risk that if these new procedures are effective in increasing the disposition rate, reducing delay and reducing private litigation costs, cases which would not have entered the system (because they were discouraged from accessing the system) will now resort to the system; if they do so in sufficient numbers they may effectively wipe out the efficiency gains initially achieved.

I have a hunch (I cannot put it any higher) that something like what I have just described actually happens in the real world: that our well-intended procedural reforms (i) simply do not have the intended impact, or (ii) the court system simply “self-corrects” by attracting new cases that cancel out any initial gains.

## **5. TO WHAT EXTENT ARE CURRENT LEVELS OF COURT CONGESTION AND DELAY REALLY A FUNCTION OF INSUFFICIENT RESOURCES BEING MADE AVAILABLE TO THE SYSTEM?**

We constantly hear that it is no answer to problems of court congestion and delay to simply keep adding more resources to the system, e.g., more judges, court rooms, etc. I agree that it is not the *only* answer and that courts have to become more efficient with what they have. (“We must do more with less”, or at least with the same.) However, I have a suspicion that this argument may have been overplayed in Ontario and that, in fact, resources have significantly failed to keep up with caseload increases. (I made enquiries as to whether data is available that will illuminate this issue, e.g., court filings over the last 10 or 15 years and the extent to which the numbers of judges have kept up with the increases in the civil and criminal case filings. The Ministry has recently supplied some confusing data which I am attempting to analyze).

Obviously the productivity gain and delay reduction that might result from significant increases in the number of judges and court rooms would be subject to the same analysis presented above, i.e. it may be that any savings are wiped out relatively quickly because the speedier system simply now attracts more cases leading to a further cycle of congestion and delay. If this were to happen presumably there would be a point at which the system would stabilize, i.e., further delay reduction would not attract more cases to the system. At first blush this might appear to be the Nirvana; query whether it might only be achievable with a level of public expenditure which is simply unacceptable to government or to the electorate.

**6. REDUCING PRIVATE COSTS THROUGH PROCEDURAL REFORM: “LADIES AND GENTLEMEN, JUST TELL US HOW MUCH DUE PROCESS YOU WANT” (BUT, AGAIN “IT AIN’T EASY”)**

I have already examined procedural reforms aimed at increasing disposition rates or bringing about earlier dispositions. However, there are other areas of possible procedural reform which focus on simplifying court procedures. This may be viewed as a search for a “cost and delay control model” as supposed to a “cadillac or maximum due process model” of procedure. In terms of cost control the strategy here is to reduce the steps involved in litigation, particularly steps carried out by lawyers, so as to reduce litigants’ costs. As anybody who has been involved in procedural reform will attest, the way our civil procedure is presently structured does not give reformers a great deal of room to manoeuvre. (See the attached appendix—prepared for another purpose—in which I discuss some of the implications that follow from our reliance on a process that culminates in an “oral, continuous trial”).

A current favourite among proposed procedural reforms is to significantly reduce discovery as a way of reducing litigants’ costs. Here the issue quickly becomes one of competing values (again): how much due process do the litigants want and how much should we be prepared to give them? Major discovery reform *may* reduce costs, but it raises questions and fierce debate as to whether reform in this area would make the system unacceptably “less fair” and whether in some, or even many cases, such reforms would have a significant effect on substantive outcomes. Moreover, it does not necessarily follow that reducing discovery will in fact reduce costs. Let us take for example proposals to abolish examination for discovery (depositions). If in response to such a radical reform lawyers pursue other strategies in an attempt to obtain the information no longer obtainable on discovery, then if such strategies are as expensive or more expensive than examination for discovery, costs will not be reduced. I believe this is point is too often overlooked by advocates of discovery reform. If one thinks about it for a moment, it becomes clear just how efficient a fact gathering mechanism is one requiring the opposing party to sit down, take an oath, and answer the opposing party’s questions. To obtain the same information other than through this process seems to me to likely to be much more expensive than the examination for discovery process itself. In this context, I think it is worth keeping in mind that there is little indication that litigation costs are any lower in England, where examination for discovery has never been available.

In terms of reducing delay in litigation, the use of case management together with its escalator principle (once you commence an action you get on to a moving walkway which will lead you to trial in X days) would seem to be the answer. The essence of this technique is to structure the system in a way that



forces lawyers to work more intensively on fewer cases at a time, leading to an earlier disposition of individual cases. (If it works it likely also contributes to saving private costs since with earlier disposition there will be less re-preparation time for lawyers). However, at least in the Ontario context, case management breaks down, not on the lawyer side, but on the court side. Experience indicates that lawyers can be successfully forced to meet the court imposed time table, but typically courts have been unable to deliver on their side of the bargain; because of the existing backlog of cases, courts are simply unable to deliver timely trial dates to case managed cases. Consequently, case management will never be an effective answer to delay until the existing inventory of backlogged cases is depleted.

There is one further area of procedural reform which may have promise. I already referred to this i.e., broadening the availability of summary judgment and proceedings by application. (For our American friends let me explain that we have two different types of court proceedings—"actions" and "applications". Actions involve pleadings, discovery etc., and if not settled they will eventually proceed to trial. Applications do not involve pleadings, merely a notice as to the relief sought plus supporting and opposing affidavits; discovery is unavailable and they come on for a final hearing in a relatively short time before a judge.) The central idea here is to broaden the scope for disposition of proceedings on paper, rather than requiring so many cases to be bound for a trial based on oral evidence. Reforms have been introduced in British Columbia and Manitoba along these lines. Essentially what they have done is change the standards applicable on a motion for summary judgment. Courts are no longer limited to granting summary judgments only where there is no genuine issue for trial. The court is given the further power to resolve even disputed issues of fact on the basis of affidavit evidence where the court feels in all the circumstances it can do so.

Essentially the idea is to "break the mould" that the reliance on the "oral, continuous trial" has imposed on our procedure—see the appendix. What this avenue of inquiry suggests is a radical re-thinking of adjudicatory procedure and it raises a range of questions. In approaching and practising adjudication, from the litigant's viewpoint have we put undue emphasis on fact indeterminacy and the role of fact finding? Have we exaggerated the range of options typically open to the finder of fact? In our teaching and in practice, do we overemphasize factual indeterminacy and should we be assuming more often that, in all probability, the judge will find X i.e., we over-focus on evidentiary differences between the parties which will not likely alter the ultimate fact finding? (Here have we been too influenced by the United States i.e., there may be a wider range of possible fact determinations in trials by a jury, but much narrower if trial is by judge alone?) Do our current procedures, in particular broad-ranging discovery, encourage a search for what may be actually non-existent fact differences?



In this context I recall something that Ben Kaplan once said in comparing procedural systems (although I have never been able to track down the source of the statement). After studying German, English and American procedure, he suggested that they could be ranged along a spectrum of fact sensitivity—“the continentalists are uninterested in the facts, the English are mildly interested and the Americans are obsessed with them”.

## **7. THE NEED TO MEASURE THE IMPACT OF PROCEDURAL CHANGES**

Although we have been pre-trying cases for decades, we still do not know what is the impact of pre-trial conferences on litigation. We know that they increase the public and private cost of litigation, but we do not know whether they also bring increased settlement rates or bring about earlier settlements. (There is anecdotal, but strong, evidence that in Ontario many lawyers no longer discuss settlement at the completion of examination for discovery—as they once did—and hold off such discussions until they have obtained the judge’s views at the pre-trial conference.) Similarly, we do not know what will be the impact of court mandated mediation. Unless we wish to “wallow around forever” in ignorance as to the actual impact of procedural reforms, we have to take steps to measure their impact, notwithstanding that to do this is both time-consuming and expensive. If we do not do this, we will simply never know enough about our dispute resolution system, whether or not it encompasses ADR, to effectively and rationally deal with the problems of cost, delay and access to the system.

## APPENDIX

## CIVIL PROCEDURE — ITS STRUCTURE AND PURPOSE

*(This is intended to be a hand out given to students early in the basic course in Civil Procedure.)*

...

I would like to consider two different ways of viewing or explaining civil procedure. Both approaches are essentially functional i.e., designed to explore what is the function or purpose of civil procedure. The first is a quasi-historical perspective which argues that by adopting a particular form of adjudication—a fact-finding trial which comes at the end of the process—we more or less conditioned what had to come earlier in the process. The second approach, a due process perspective, is more abstract and poses the question of what characteristics should the civil procedure process possess in order to be “fair”.

## AN HISTORICAL PERSPECTIVE

I suggest that to understand the structure of our civil procedure one has to understand its historical genesis, because one particular characteristic of the civil procedure process shaped its overall basic structure. If one goes back into the 19th century, at common law all civil actions were tried by a jury, and trials had a particular character—they were “oral, continuous trials” (and this is still largely true today). They were “oral” in the sense that witnesses attended in person, were sworn, and gave their evidence orally. Documents might be received into evidence, but had to be proven by oral evidence. By contrast, in equity (the judicial system that competed with the common law) the fact-finder was confronted not with live, oral evidence, but with evidence which had been reduced into writing in the form of affidavits or written transcripts of examinations. This orality (“oralness”) has both a purpose and a consequence. The purpose is to better enable the fact-finder to evaluate the evidence—to make a determination as to the credibility of the witnesses—by being able to observe the manner in which the evidence is presented and in particular the demeanour of the witness. But an important consequence of this process (from the lawyer’s perspective) is its *immediacy*. The production of the evidence and its receipt by the trier of fact takes place simultaneously, unlike the situation where, for example, evidence is being adduced by affidavit. If I am adducing a witness’s evidence by affidavit I will know what that witness’s evidence is when the affidavit is sworn, which will usually be well in advance of when it is presented to the judge. More importantly, you (as opposing counsel) will typically see that affidavit before the hearing and before the judge hears (or sees) the evidence. Hence you would know in advance of the hearing what my evidence will be

(indeed, *exactly* what my evidence will be, assuming I have to serve you with all my affidavits before the hearing). By contrast, at an oral trial you (as my adversary) first hear my witness's actual evidence at the very same time as it is heard and received by the judge.

This brings us to the second aspect of the "oral, continuous trial". At common law trial by jury was always continuous. If you, as my adversary, were taken by surprise by the evidence you heard for the first time when my witnesses testified orally, there was no question of relieving against this surprise by granting you an adjournment, i.e., stopping the trial for some days or weeks while you developed a response to the unanticipated evidence that you had just heard for the first time. The jury, a group of strangers brought together for the purpose of trying the case, could not be sent away (it was felt) and told to come back on another day to hear further evidence. So as not to inconvenience the jury, there could be no adjournments.

Although today trial by jury in civil cases is very much the exception, rather than the rule, and it is much easier for a judge sitting alone to grant an adjournment, even our modern day civil procedure continues to be shaped by the notion of the "oral, continuous trial". We want the process to be fair (more of this later under due process) and in order for the process to be fair if there is to be an oral, continuous trial, the parties need to know in advance pretty much what is going to happen at the trial in terms of what evidence is going to be adduced. Otherwise, parties can be faced with what is often referred to as "genuine surprise". By this term we usually mean that parties are confronted at trial with evidence which they might have been able to contradict or weaken through other evidence had they known in advance that such evidence was going to be adduced. To avoid this happening we have developed pre-trial procedures which are designed, *inter alia*, to avoid surprise at trial by (in a sense) "scripting in advance" what will happen at the trial. We do this principally through various forms of notice-giving. The issues to be litigated are defined in advance through the exchange of written allegations and responses referred to as *pleadings*—at the beginning of the law suit, the plaintiff sets forth what he or she alleges the defendant did, and the defendant responds in writing as to whether he or she agrees with this statement or how he or she otherwise responds to these allegations. But in developing our pre-trial procedure (at least in North America) we have gone beyond merely requiring the parties to articulate well in advance of the trial what are their allegations and responses. We also require the parties to go a long way in terms of disclosing, prior to trial, the facts and evidence they will adduce at the hearing. This process of fact disclosure is generically referred to as *discovery* and encompasses both the disclosure of documents, and the disclosure of facts and evidence through the process of pretrial examination for discovery (and to a lesser extent through such other discovery devices as medical examinations and orders for the inspection of property). It is now well recognized that the major objective of "discovery" is to avoid surprise at trial, i.e., situations



where a party is confronted with evidence for the first time at the oral hearing which does not give the party a fair opportunity to respond to the evidence.

If you think about it, there are other ways to deal with this problem of surprise, at least if you are not wedded to the concept of an “oral, continuous trial”. One obvious way to deal with it would be to abandon the concept of a continuous hearing and simply adopt a rule that if a party is genuinely surprised by evidence that is adduced at trial then there will be an adjournment, i.e., sufficient time for the surprised party to marshal evidence in response to the surprising evidence. Indeed, today in cases of genuine surprise, this is how the court will often react (at least if it is a trial by judge alone, although in jury trials a court is still reluctant to grant adjournments). However, such an approach can be inefficient and lead to increased costs which will have to be borne by somebody. Continental procedure never really got into this “bind” of how to deal with surprise, because they never adopted the idea of an “oral, continuous trial”. Typically, in continental procedure there never was a continuous hearing, but rather a series of partitive hearings with the court sitting for a day or two here to take evidence and then reconvening, perhaps a month later, to hear some more evidence, etc. This vehicle of partitive hearings allowed the parties to deal with any problem of surprise by turning up at the next hearing date prepared to counteract evidence that may have been heard at an earlier hearing date. But this was not the style of the common law. At least in conception, the trial is viewed much like a theatrical play—oral, and continuous—it starts, and continues until it is finished. Just as with a play, the common law concluded that the trial has to be “scripted” in advance through the devices of pleading and discovery.

So, I have argued, the oral, continuous trial necessitated the procedural notice-giving devices of pleadings and discovery. But this analysis does not stop there. Other characteristics of the trial have also conditioned or structured our civil procedure.

*Provisional Remedies.* The common law assigns fact-finding to the trial—a culminating event which comes at the end of the process and which nearly always takes a considerable time to reach (at least, in part, because the pleading and discovery phases take time). Because of this, the common law has had to allow for *provisional remedies* (e.g., for interim injunctions to restrain allegedly injurious activity) prior to trial and before the court has an opportunity to finally rule on whether the alleged injurious activities are in fact illegal. (Such remedies, and indeed any relief that a party wishes to seek before the trial, are obtained by making a *motion* to a non-trial court. This is typically done by a document called a *notice of motion*, if necessary supported by affidavit evidence.)

*If there are no facts in dispute, we do not need a trial.* The trial is a forum for resolving disputed issues of fact. As explained earlier, that is why the hearing is oral, so that the fact-finder (judge or jury) can hear and see the witnesses and



make findings as to their credibility. It follows logically from this proposition that if there are no genuine issues of fact to be resolved, then we do not need a trial. This is the role of a *motion for summary judgment*. If one party can show early in the litigation and long before trial that (despite what is said by the parties in their paper allegations, i.e., the pleadings) that there is no genuine issue or dispute with regard to the facts, then the court will rule that a trial is unnecessary. If the dispute between the parties is merely one as to the applicable law this does not necessitate a trial, since the purpose of the trial is to hear oral evidence and resolve disputes as to the facts. If no facts are in dispute then a non-trial court (e.g., the court hearing the motion for summary judgment) is in as good a position to enunciate and apply the law as any trial court would be, and it will do so and grant a final judgment.

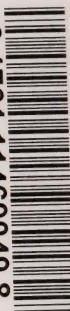
*If a claim or defence is legally invalid, we do not need a trial.* Similarly, a trial is unnecessary if a party's claim or defence is untenable or *invalid in law*. In such cases we do not need a trial (or any of the procedures, such as discovery, that are designed to aid *factual* development). Typically, the plaintiff will put his or her case at its highest in the plaintiff's pleading. If the defendant can convince the court that if the plaintiff proves everything that is set out in her statement of claim she will lose at trial because of the applicable law, a non-trial court can dismiss the action as "failing to state a reasonable cause of action" without allowing the case to proceed to trial. Similarly, if the defence pleaded by the defendant is not a valid defence in law it can be struck out in advance of the trial by a non-trial court.

## DUE PROCESS PERSPECTIVE

Let us now view civil procedure from a different, but still functional, perspective, i.e., due process. ....



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